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UNITED STATES REPORTS

VOLUME 275

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1927

FROM OCTOBER 3, 1927, TO AND
INCLUDING JANUARY 3, 1928

ERNEST KNAEBEL
REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

WILLIAM HOWARD TAFT, CHIEF JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.
LOUIS D. BRANDEIS, ASSOCIATE JUSTICE.
GEORGE SUTHERLAND, ASSOCIATE JUSTICE.
PIERCE BUTLER, ASSOCIATE JUSTICE.
EDWARD T. SANFORD, ASSOCIATE JUSTICE.
HARLAN FISKE STONE, ASSOCIATE JUSTICE.

JOHN G. SARGENT, ATTORNEY GENERAL.
WILLIAM D. MITCHELL, SOLICITOR GENERAL.
CHARLES ELMORE CROPLEY, CLERK.
FRANK KEY GREEN, MARSHAL.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see p. IV, *post*.

135419

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.[1]

ORDER OF ALLOTMENT OF JUSTICES.

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, HARLAN FISKE STONE, Associate Justice.

For the Third Circuit, LOUIS DEMBITZ BRANDEIS, Associate Justice.

For the Fourth Circuit, WILLIAM H. TAFT, Chief Justice.

For the Fifth Circuit, EDWARD T. SANFORD, Associate Justice.

For the Sixth Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Seventh Circuit, PIERCE BUTLER, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, GEORGE SUTHERLAND, Associate Justice.

March 16, 1925.

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[1] For next previous allotment, see 268 U. S., p. IV.

MR. JUSTICE SUTHERLAND was absent from the Bench from October 3, 1927, to January 3, 1928, due to illness, and took no part in the consideration or decision of any case argued or submitted during that period.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1927.

UNITED STATES EX REL. SKINNER & EDDY CORPORATION *v.* McCARL, COMPTROLLER GENERAL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 30. Argued April 14, 18, 1927.—Decided October 10, 1927.

1. Claims arising out of contracts with the Emergency Fleet Corporation are not within the jurisdiction of the Comptroller General. P. 4.
2. The Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board. P. 11.
3. The power to settle and adjust claims arising from contracts made and cancelled by the Fleet Corporation under the power delegated by the President under the Acts of June 15, 1917, and April 22 and November 4, 1918, is conferred by § 2(c) of the Merchant Marine Act, 1920, on the Shipping Board. P. 11.
4. The requirement of Rev. Stats., § 951, that in suits by the United States against individuals no claim for a credit shall be admitted unless it shall have been presented to the accounting officers of the Treasury and by them disallowed, is satisfied when the claim is presented and disallowed by the officer who has power to allow the claim, although he is not a general accounting officer of the Government. P. 12.

8 F. (2d) 1011, affirmed.

83583°—28——1

CERTIORARI, 270 U. S. 626, to a judgment of the Court of Appeals of the District of Columbia which affirmed the Supreme Court of the District in dismissing a petition for a writ of mandamus, which was sought by Skinner & Eddy in order to compel the Comptroller General to pass upon its claims against the Government, growing out of contracts with the Emergency Fleet Corporation.

Mr. Louis Titus, with whom *Mr. J. Barrett Carter* was on the brief, for petitioner.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a petition for a writ of mandamus brought in the Supreme Court of the District of Columbia in October, 1924. The relator, Skinner & Eddy Corporation, seeks to compel the Comptroller General to pass upon its claims against the Government. These arise under contracts made during the years 1917, 1918 and 1919 with the United States Shipping Board Emergency Fleet Corporation. Most of the contracts refer to the corporation as "representing the United States." The claims were presented to the Comptroller General for allowance, because Skinner & Eddy wished to be in a position to use them as a credit, if the United States should, as was threatened, sue on the contracts. It deemed this course necessary, because § 951 of the Revised Statutes (United States Code, Title 28, § 774) provides: "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them

disallowed . . ." Compare *United States* v. *Fisher Flouring Mills Co.*, 295 Fed. 691; 17 F. (2d) 232. The Comptroller General declines to consider the claims, asserting that he has neither the duty, nor the power to do so; and that the duty of passing upon them rests with the Shipping Board.

In 1923, the Fleet Corporation assigned to the United States, all of its assets, including accounts against divers persons for the payment of money. Thus, the United States is the owner, either as principal or as assignee of the Fleet Corporation, of all the claims against Skinner & Eddy. Two actions arising out of these contracts are now pending in the federal court for the Western District of Washington. One is a suit by Skinner & Eddy against the Fleet Corporation begun in 1923 in a state court of Washington and removed to the federal court. In that case, the defendant has moved to dismiss the suit on the ground that the claim sued on is one against the United States.[1] The other action is a suit by the United States against Skinner & Eddy, commenced in the federal court since this petition for a writ of mandamus was filed.

The question whether the writ of mandamus should issue is presented by a demurrer to the plea and traverse which was interposed to the answer. The Supreme Court of the District sustained the demurrer and dismissed the petition without opinion. Its judgment was affirmed by the Court of Appeals of the District, 8 F. (2d) 1011. This Court granted a writ of certiorari. 270 U. S. 636. The Government insists that the petition was properly dismissed, because claims arising out of contracts with the Fleet Corporation are not within the jurisdiction of the Comptroller General; and that even if they were, the

[1] In 1923, Skinner & Eddy began still another suit, upon the same cause of action, against the United States in the Court of Claims. It was finally allowed to dismiss that suit without prejudice. See *In re Skinner & Eddy Corporation*, 265 U. S. 86.

relief was properly denied, because his refusal to consider the claims was a disallowance thereof within the meaning of § 951, and thereby the requirement of that section was satisfied. It is conceded that mandamus is an appropriate remedy. Compare *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474.

The first contention involves a determination of the powers and duties of the Comptroller General and of the United States Shipping Board in respect to claims arising out of transactions of the Fleet Corporation. The powers and duties formerly "imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department" were transferred to the Comptroller General by Act of June 10, 1921, c. 18, Title III, §§ 301–304, 42 Stat. 20, 23, 24, (United States Code, Title 31, § 44). Section 305, amending § 236 of the Revised Statutes, provides: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."[2] The language of this grant, if standing alone, might possibly be broad enough to include authority to audit accounts and to pass upon claims

[2] The accounting branch of the Treasury Department was created by the Act of September 2, 1789, c. 12, §§ 1, 3, 5, 1 Stat. 65, 66. Steps in its growth and in the development of its control over Government expenditures may be traced in the Acts of May 8, 1792, c. 37, § 1, 1 Stat. 279; July 16, 1798, c. 85, § 1, 1 Stat. 610; March 3, 1817, c. 45, §§ 1, 3-5, 3 Stat. 366, 367; May 7, 1822, c. 90, 3 Stat. 688; March 30, 1868, c. 36, 15 Stat. 54; June 8, 1872, c. 335, §§ 21-25, 17 Stat. 283, 287-288. In 1894 there was a general revision of the statutes dealing with the accounting officers. Act of July 31, 1894, c. 174, 28 Stat. 162, 205-211. The powers and duties there outlined were in the main those transferred to the General Accounting Office by the Act of 1921.

The question of the jurisdiction of the Comptroller General is not a question as to bookkeeping merely. The decision of the

arising out of contracts made by a Government-owned corporation "representing the United States." But here it must be construed in the light of the statutes dealing specifically with the Shipping Board and the Fleet Corporation, of the latter's origin and character and of the administrative practice prevailing with regard to it and other similar corporations.

The Fleet Corporation was organized on April 16, 1917—ten days after the United States declared war. All of its stock was subscribed and paid for by the Shipping Board on behalf of the United States. And all the stock has been held by it since. The company was formed by the Shipping Board pursuant to the specific authority to form one or more corporations, which was conferred by the original Shipping Board Act, September 7, 1916, c. 451, § 11, 39 Stat. 728, 731. Congress conferred this authority in contemplation of the possibility of war, and it required that any such corporation should be dissolved "at the expiration of five years from the conclusion of the present European War." The Fleet Corporation is thus an instrumentality of the Government. See *United States* v. *Walter*, 263 U. S. 15, 18. But it was organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct and operate merchant vessels. The Act authorized the Board "to sell with the approval of the President, any or all of the stock of the United States in such corporation, but at no time

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Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the Government. Act of July 31, 1894, c. 174, § 8, 28 Stat. 162, 207, following the provisions of the earlier Act of March 30, 1868, c. 36, 15 Stat. 54. Save in cases where resort is had to the courts, therefore, the Comptroller is the final arbiter as to the legality of expenditures. See Annual Report of the General Accounting Office, 1924, p. 3. See *St. Louis, Brownsville & M. Ry. Co.* v. *United States*, 268 U. S. 169, 173-174.

shall it be a minority stockholder therein." Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; it does not enjoy the priority of the United States in bankruptcy proceedings, *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549; and its employees are not agents of the United States, subject to the provisions of § 41 of the Criminal Code. *United States* v. *Strang,* 254 U. S. 491. Compare 34 Op. Atty. Gen. 241.

Government-owned private corporations were employed by the United States as its instrumentalities in several other fields during the World War. The Food Administration Grain Corporation (later called the United States Grain Corporation) was organized under the laws of Delaware under the Food Control Act, August 10, 1917, c. 53, § 19, 40 Stat. 276. See Act of March 4, 1919, c. 125, 40 Stat. 1348, and Executive Orders, August 14, 1917, March 4, 1919. The United States Spruce Corporation was organized by the Director of Air Craft Production under the laws of the District of Columbia, pursuant to the Act of July 9, 1918, c. 143, 40 Stat. 845, 888–889, for the purpose of aiding in the production of aircraft material. The United States Housing Corporation was organized under the laws of the District of Columbia by authority of the President, for the purpose of providing housing for war needs under the Act of June 4, 1918, c. 92, 40 Stat. 594, 595. The War Finance Corporation was organized under the Act of April 5, 1918, c. 45, 40 Stat. 506, to assist financially, industries important to the successful prosecution of the War. For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connection with the Canal.[3] And, since

[3] The United States acquired all the stock in the Panama Rail Road Company in order that the railroad, with its adjuncts, might be used in the manner most helpful to the Government in constructing the

the War, the Inland Waterways Corporation has been organized by the Secretary of War to operate the Government-owned inland waterways system pursuant to the Act of June 3, 1924, c. 243, 43 Stat. 360. The Government likewise has established, and holds all the stock in the Federal Intermediate Credit Banks, formed under the Act of March 4, 1923, c. 252, § 205, 42 Stat. 1454, 1457, to bring about easier agricultural credits.[4]

At no time, during the War, or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the Government or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General.[5] The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during Federal Control,[6] have been audited, and the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of

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Canal. See letter of Wm. H. Taft, Secretary of War, in Annual Report of Isthmian Canal Commission, 1904, pp. 13–15; Annual Report of Directors of Panama Rail Road, 1904, pp. 8–9; Annual Report of Isthmian Canal Commission, 1905, p. 18. For a list of the functions performed through the agency of the Rail Road, see Annual Report of Governor of Panama Canal, 1921, Chart facing p. 55. See also Panama Canal Act, August 24, 1912, c. 390, § 6, 37 Stat. 560, 563–564. On the auditing of Rail Road accounts, see Annual Report of Isthmian Canal Commission, 1905, p. 179; Annual Report of Governor of Panama Canal, 1915, p. 42.

[4] The Government also held over 98% of the stock in the Federal Land Banks, when they were first created under the Act of July 17, 1916, c. 245, § 5, 39 Stat. 360, 364, but its holding now amounts to less than 2%. See Annual Reports of the Secretary of the Treasury, 1917, p. 38; 1926, p. 106.

[5] See Annual Report of Comptroller of the Treasury, 1919, pp. 23-26.

[6] See the Federal Control Act, March 21, 1918, c. 25, § 12, 40 Stat. 451, 457.

administration.[7] Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States.[8] It is true that a kind of audit of the Fleet Corporation's transactions was later made by the general accounting officers pursuant to special legislation, said to have been enacted at the request of the Shipping Board. But there is no contention that these statutes, or the audit made thereunder, affect in any way the question here presented,[9] save that they may show Congressional approval of the practice theretofore prevailing. It may be that the other corporations above-mentioned expended no moneys

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[7] The accounts of the Housing Corporation were handled by the Comptroller of the Treasury and his successors after the passage of the Act of July 11, 1919, c. 6, 41 Stat. 35, 55-56, providing that the funds of the Corporation be covered into the Treasury.

[8] See e. g. Annual Report of Inland Waterways Corporation, 1925, pp. 2-3.

[9] The Appropriation Act of July 1, 1918, c. 113, 40 Stat. 634, 651, directed the Secretary of the Treasury "to cause an audit to be made of the financial transactions of the United States Shipping Board Emergency Fleet Corporation, under such rules and regulations as he shall prescribe"; the Appropriation Act of March 20, 1922, c. 104, 42 Stat. 437, 444, directed the Comptroller General to make such audit, commencing July 1, 1921, "in accordance with the usual methods of steamship or corporation accounting and under such rules and regulations as he shall prescribe." These special audits were of a nature to afford some information concerning past transactions. But the Acts did not vest control over expenditures either in the Secretary of the Treasury or in the General Accounting Officer making the audit; and none was asserted. The nature, occasion and purpose of these special audits is set forth in the Annual Reports of the Comptroller of the Treasury, 1919, pp. 23-26; 1920, pp. 24-41; and in the Annual Reports of the General Accounting Office, 1923, p. 34; 1924, p. 12; 1926, p. 45-46.

appropriated by Congress save those received from the sale of stock to the Government, whereas the Fleet Corporation had the benefit of money appropriated to the Shipping Board and by it turned over to the Corporation.[10] The first statute making such an appropriation, however, provided in terms that the moneys were to be expended "as other moneys of said corporation are now expended." Act of June 15, 1917, c. 29, 40 Stat. 182, 183.

The transactions of the Fleet Corporation arose out of the exercise of powers conferred upon it in several different ways. It was urged in the argument that the question of the jurisdiction of the Comptroller General would depend upon the source of the power giving rise to the transactions under consideration, because of certain special statutory provisions as to compensation for claimants, now to be considered. Besides powers conferred by the general incorporation laws of the District of Columbia, the Fleet Corporation was vested, by delegation from the President,[11] with the powers conferred upon him by Acts of June 15, 1917, c. 29, 40 Stat. 182; April 22, 1918, c. 62, 40 Stat. 535; and November 4, 1918, c.

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[10] See, in addition to the appropriation act referred to in the text, the Acts of October 6, 1917, c. 79, 40 Stat. 345; July 1, 1918, c. 113, 40 Stat. 634, 650; June 5, 1920, c. 235, 41 Stat. 874, 891; March 4, 1921, c. 161, 41 Stat. 1367, 1382; August 24, 1921, c. 89, 42 Stat. 192; June 12, 1922, c. 218, 42 Stat. 635, 647-648; February 13, 1923, c. 72, 42 Stat. 1227, 1241-1242; June 7, 1924, c. 292, 43 Stat. 521, 530-531; March 3, 1925, c. 468, 43 Stat. 1198, 1209-1210. The last four of the appropriation acts referred to provide that "No part of the sums appropriated . . . shall be available for the payment of certified public accountants . . . and all auditing of every nature requiring the services of outside auditors shall be furnished through the Bureau of Efficiency: *Provided,* That nothing herein contained shall limit the . . . United States Shipping Board Emergency Fleet Corporation from employing outside auditors to audit claims in litigation for or against the . . . Corporation."

[11] See Executive Orders, No. 2664, July 11, 1917; No. 2888, July 18, 1918; No. 3018, Dec. 3, 1918.

201, 40 Stat. 1020, 1022. Among them were the power to construct vessels and the power to modify, suspend, cancel or requisition existing or future contracts for the construction of vessels. The Act of June 15, 1917 provided also that when the United States should cancel or requisition any contract, it should make just compensation to be determined by the President; and that, if the persons concerned were dissatisfied with that determination, 75 per cent. of the amount so determined was to be paid; and that suit for the additional amount claimed might be brought against the United States, in the manner provided in § 24 (20) and § 145 of the Judicial Code. The Merchant Marine Act 1920, June 5, 1920, c. 250, § 2, 41 Stat. 988, repealed the provisions of the Acts of 1917 and 1918 above referred to; but it preserved all rights and remedies accruing as a result of any action taken under the provisions repealed; provided by § 2 (b) for their enforcement as though the Act had not been passed, except that, as provided in § 2 (c), the Shipping Board should as soon as practicable "adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any such powers and duties relating to the determination and payment of just compensation: *Provided,* That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed."

The claims of Skinner & Eddy were mainly for the cancellation by the Fleet Corporation of contracts for the construction of vessels. The Government contends that the contract giving birth to the claims arose out of or was incident to the exercise by or through the President

of the powers conferred upon him by the statutes referred to in § 2 (c) of the Merchant Marine Act, 1920, and, hence, that the Shipping Board, and not the Comptroller General, has the power and duty to settle and adjust them and thus to allow or disallow any claims by way of credits or set-offs arising out of the contracts. Skinner & Eddy urge that their contracts were made by virtue of the power conferred upon the Fleet Corporation by the Shipping Act of 1916; that a controversy arising out of such contracts is not within § 2 (c) of the Merchant Marine Act, 1920; and that, hence, the Comptroller General had jurisdiction over its claims. We have no occasion to determine whether the contracts here in question were made under the original charter power of the Fleet Corporation or under the additional powers acquired by delegation from the President. Even if § 2 (c) has no application, because the contracts were not entered into pursuant to the power delegated by the President in 1917, it does not follow that the claims fall within the jurisdiction of the Comptroller General. For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board. If, on the other hand, the contracts were made and cancelled by the Fleet Corporation under the power delegated by the President, the settlement and adjustment of the claim falls clearly within the powers conferred by § 2 (c) upon the Shipping Board.

There is nothing in the language of the statutes, or in reason, to support the suggestion that the Shipping Board has the power to adjust claims, but that the adjustment does not become operative unless there is approval of the final settlement by the Comptroller General. Nor is

there any basis for the further suggestion of Skinner & Eddy that the Shipping Board has power to make settlement, if it can; but where a settlement is not made and a suit by the United States is brought or threatened, the Comptroller General is the official to whom must be presented all claims for credit in such suit. It is true that the Merchant Marine Act did not modify § 951 of the Revised Statutes or impair the right of a defendant to a credit if sued by the United States upon a Fleet Corporation contract. Since the passage of the Merchant Marine Act, as before, the defendant may set up the credit, if he can show disallowance by the appropriate accounting officers. But § 951 does not prescribe who the appropriate officer is or that the claim must be presented to a general accounting officer of the Government. As was held in *United States* v. *Kimball,* 101 U. S. 726, the requirement of the section is satisfied when the claim is presented and disallowed by the officer who has power to allow the claim, although he is not a general accounting officer of the Government.

The Court of Appeals of the District based its judgment of affirmance solely upon the ground that, since the claims involved were already in the course of litigation in two suits in another federal court, no other court of coördinate jurisdiction could interfere. The Comptroller General had originally taken a somewhat similar ground for declining to act. But later he stated, in the trial court, that his answer should be taken as broadly denying his jurisdiction to consider claims of this nature. And, in this Court, he specifically disclaimed reliance upon the ground taken by the Court of Appeals. We have no occasion to consider its validity. Nor need we consider whether the refusal of the Comptroller General to take jurisdiction was a disallowance of the claim within the meaning of § 951 or any of the other questions which have been argued concerning the application of that section.

Affirmed.

Syllabus.

MAMMOTH OIL COMPANY ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 140. Argued April 12, 13, 1927.—Decided October 10, 1927.

1. The lease and contract in this case—which involve *inter alia* the letting of a Naval Petroleum Reserve for exploitation by a private corporation and a scheme for obtaining fuel oil and elaborate storage facilities for the Navy by means of the royalties of crude oil provided for the United States in the lease—were without authority of law, and the United States is entitled on that ground to have them canceled. *Pan American Petroleum Co.* v. *United States*, 273 U. S. 456. Pp. 35, 53.
2. The facts and circumstances in evidence require a finding that, pending the making of the lease and agreement, the representative of the Government (former Secretary of the Interior) who dominated the transactions, and the representative of the lessee corporation, contrary to the Government's policy for the conservation of oil reserves for the Navy and in disregard of law, conspired to procure for the company all the products of the reserve on the basis of exchange of royalty oil for construction work, fuel oil, etc.; that the former so favored the latter and the making of the lease and agreement that it was not possible for him loyally or faithfully to serve the interests of the United States or impartially to consider the applications of others for leases in the reserve, and that the lease and agreement were made fraudulently by means of collusion and conspiracy between them. P. 35.
3. Evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to contradict. P. 51.
4. Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge that the lease and contract were procured for the defendant corporation through fraud participated in by the principal representative of the company, the United States was not required to call him as a witness; and his silence makes strongly against the company. It is as if he personally held the lease, were defendant, and failed to testify. P. 52.

5. While the failure of such representative to testify can not properly be held to supply any fact not reasonably supported by the substantive evidence in the case, it justly may be inferred that he was not in a position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case. P. 52.
6. There is no occasion to consider, and the Court does not determine, whether the former Secretary of the Interior was bribed. P. 53.
7. It was not necessary for the Government to show that it suffered or was liable to suffer loss or disadvantage as a result of the lease or that the former Secretary of the Interior gained by or was financially concerned in the transaction. P. 53.
8. An oil-purchasing company bought from the fraudulent lessee in this case the tanks which the latter had built or was building on the demised naval reserve under the lease and in pursuance of the fraudulent scheme, and used them for storing oil from an adjacent oil field. The purchaser was owned half and half by two companies whose boards of directors were headed, respectively, by S, who represented the lessee in obtaining the fraudulent lease, and by another person who had acted with him, shortly before the purchase, in controlling the purchasing company in respect of other important transactions

   Held, that the purchasing company must be presumed to have known that there was no law authorizing the lease; that the circumstances disclosed in the case were sufficient to impute to it S's knowledge of the fraud; and that it was not entitled to use or remove the tanks. P. 54.
9. A pipe-line company which, as the lessee's nominee, built a pipeline and related improvements on the naval reserve, for transportation of oil therefrom, in pursuance of the fraudulent lease, and which was owned half and half by the two companies referred to in the preceding paragraph as owners of the purchasing company therein mentioned, was chargeable with notice that the use of reserve oil to procure the construction of the pipe line was a part of the plan for the unauthorized exhaustion of the reserve; that such use furthered the violation of law and was contrary to the established conservation policy. It stands on no better ground than the lessee would have occupied if it had made the improvements in question. P. 55.

14 F. (2d) 705, affirmed.

CERTIORARI, 273 U. S. 686, to a decree of the Circuit Court of Appeals, which reversed a decree of the District

Court, 5 F. (2d) 330, dismissing a suit brought by the United States to cancel an oil and gas lease covering a Naval Petroleum Reserve in Wyoming, and to set aside also a supplementary agreement between the same parties. There were prayers for possession of the leased lands, for an accounting, and for general relief. The grounds of the suit were fraud and corruption, and lack of legal authority to execute the instruments. The court below sustained the Government's contention on the ground of fraud and corruption. Compare *Pan American Petroleum Co.* v. *United States,* 273 U. S. 456.

Messrs. John W. Lacey and *Martin W. Littleton,* with whom *Messrs. George P. Hoover, Paul D. Cravath, G. T Stanford, Herbert V. Lacey, J. W. Zevely, Douglas M. Moffat,* and *R. W. Ragland* were on the brief, for petitioner, Mammoth Oil Co.

The legal effect of the evidence is always a question of law. The rule in the federal courts has long been well settled that fraud is not to be presumed; that it is not to be presumed from any number of lawful acts; that where an act and circumstance are as consistent with an honest motive as with a dishonest one, the former must be preferred; that fraud cannot be proved by a bare preponderance of the evidence, but only by evidence that is clear, unequivocal and convincing.

No inference is reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption. The law requires an open, visible connection between the principal fundamental facts and the deductions to be made on remote inferences. A presumption is not a circumstance in proof, and it cannot therefore be made the legitimate foundation for another presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact which is sought to be

established by the dependent presumption. *United States* v. *Ross,* 92 U. S. 281; *Manning* v. *Ins. Co.,* 100 U. S. 693; *Looney* v. *Met. Street Ry.,* 200 U. S. 480; *U. S. Fidelity Co.* v. *Bank,* 145 Fed. 273; *Vernon* v. *United States,* 146 Fed. 121; *Postal Tel. Co.* v. *Livermore,* 188 Fed. 696; *Cunard Co.* v. *Kelley,* 126 Fed. 610; *Davis* v. *United States,* 18 App. D. C. 468.

No unfavorable presumption arises from the failure to produce evidence unless there is some duty to produce it, nor unless it is shown to be within the control of the party who fails to produce it, nor from the failure to call as a witness one whom the other party had the same opportunity of calling, nor if the testimony not given is privileged. *Vajtauer* v. *Commr.,* 273 U. S. 103; *State* v. *Buckman,* 74 Vt. 309; *Cross* v. *L. S. Ry.,* 69 Mich. 363; *Bank* v. *Hyland,* 6 N. Y. Supp. 87; *Erie R. R.* v. *Kane,* 118 Fed. 223; *Scovill* v. *Baldwin,* 27 Conn. 316; *Bleeker* v. *Johnston,* 69 N. Y. 309; *Arbuckle* v. *Templeton,* 65 Vt. 205; *Crawford* v. *State,* 112 Ala. 1. No inference may be drawn from the refusal of the witness to testify on the claim of constitutional privilege against self incrimination. *Beach* v. *United States,* 46 Fed. 754; *State* v. *Harper,* 33 Ore. 524; *Powers* v. *State,* 75 Neb. 226; *State* v. *Weaver,* 165 Mo. 1.

A defendant is not called upon to introduce evidence to contradict or explain facts which are insufficient to establish any liability against him. The true rule is, that silence of a party may be considered in weighing proofs already adduced tending to fix a liability on him in matters where complete and more exclusive knowledge of the facts concerning which he is silent, is laid at his door. Jones, Evidence, 2d ed., vol. 1, § 104; *Owens Co.* v. *Kanawha Co.,* 259 Fed. 838; *Omar Co.* v. *Bair Co.,* 285 Fed. 588; *Stimpson* v. *Hunter,* 234 Mass. 61; *Shotwell* v. *Dixon,* 136 N. Y. 43; *Loper* v. *Askin,* 178 App. Div. 163; *Tex.*

& Pac. Ry. v. *Shoemaker,* 98 Tex. 451; *Blackman* v. *Andrews,* 150 Mich. 322; *Chi. Mill Co.* v. *Cooper,* 90 Ark. 326; *Thompson* v. *Davitte,* 59 Ga. 472; *Lowe* v. *Massey,* 62 Ill. 47; *New Orleans* v. *Gauthreaux,* 32 La. Ann. 1126.

The opinion of the Circuit Court of Appeals clearly discloses that bribery constitutes the basis of its adverse finding. There is no evidence that Mr. Sinclair ever received any Liberty bonds as a dividend or otherwise from the Continental Trading Co., or that he ever delivered any Liberty Bonds to Secretary Fall (except $25,000 of bonds loaned in June, 1923, which admittedly had no relation to the $230,500 lot of bonds). The court's conclusion is, therefore, entirely based upon inferences. The court itself so concedes. The finding that Sinclair delivered or caused to be delivered bonds to Secretary Fall in May, 1922, was pure inference drawn, not from any fact or circumstance disclosed by the record, but in the first instance from certain other basic inferences, and secondarily from numerous other basic inferences.

Counsel for the Government claim that the Court of Appeals "was not building one assumption upon another. It was making a single inference from many proven circumstances all pointing one way." An easy way to avoid pointing out any circumstances is, with a broad sweep of the hand, to say, "many circumstances." The Court of Appeals in fact concedes that it must conjecture as to how Everhart acquired the bonds and it infers that he got them from Sinclair by inferring that Sinclair was a stockholder in the Continental Trading Co., that as such stockholder he was entitled to receive in May, 1922, a dividend from the company, that he and he alone of the actual or alleged stockholders of the company, and he alone of all people, had a motive to bribe Secretary Fall, that Everhart could not have acquired the bonds in any way other than as a bribe for Secre-

tary Fall, and from those inferences drew the inference that Sinclair did receive and deliver to Everhart or caused to be delivered to him by the Continental Trading Co., Liberty Bonds in May, 1922, as a bribe for Secretary Fall.

Having inferred that Sinclair received Liberty Bonds from the Continental Trading Co., and that he delivered the bonds to Secretary Fall as a bribe, the court then supports its structure of inferences by two props of the same material, namely, inferences drawn from the failure of the Mammoth Oil Co. to call Secretary Fall and Sinclair as witnesses to deny the charge of bribery. Fall was as available to the Government as a witness as he was to the Mammoth Oil Co. The fact that he did not demand to appear as a witness in an action to which he was not a party to deny a charge of corruption not made in the bill is made the basis of an inference against the Mammoth Oil Co. Sinclair's failure to take the stand and deny that he was a stockholder in the Continental Trading Co., is used by the court as the final and special ground for the inference that he was such a stockholder, and his silence in respect of the charge of bribery is treated as evidence of the truth of the charge.

The Court of Appeals, in drawing additional inferences, treated as facts from which to draw inferences, things not shown by the record to be facts—indeed, things shown by the record not to be facts; it drew inferences against the petitioners from facts unrelated to the lease or contracts in controversy and from facts with which neither the petitioners nor anyone representing them had any connection; it drew sinister inferences from facts and circumstances perfectly lawful and entirely consistent with integrity, both of purpose and conduct; in the last analysis it drew such inferences from its own inferred conclusion of bribery.

Was Secretary Denby's decision, that there was danger of drainage, arbitrary or capricious or wholly unsupported by evidence? *Silberschein* v. *United States*, 266 U. S.

221. This is a question of fact, and upon it the Court of Appeals concurred with the District Court in finding that the lease to the Mammoth Oil Co., was within the authority of the Act of June 4, 1920.

No officer of the Government is shown to have been remiss in any matter evidenced by the secrecy claimed, but it would not be enough that such officer were shown remiss in order to cancel the contracts here. It would be necessary to show in addition that the Mammoth Oil Co., or Sinclair, who represented it, participated in it or at least knew of the dereliction. This is the rule in actions to set aside conveyances with intent to defraud creditors. *Prewitt* v. *Wilson,* 103 U. S. 22; *Jones* v. *Simpson,* 116 U. S. 609; *Cohan* v. *Levy,* 221 Mass. 336; *In re Locust Co.,* 299 Fed. 756.

It is likewise true in cases where an agent with apparent authority disposes of his principal's property, the agent being guilty of fraud in the matter against his principal but without notice to or participation therein by the purchaser. *Andrews* v. *Solomon,* 1 Fed. Cas. 889; *Paxton* v. *Marshall,* 18 Fed. 361; *Brooks* v. *Dick,* 135 N. Y. 652; *Mason* v. *Bauman,* 62 Ill. 76; *Pac. Exp. Co.* v. *Carroll,* 66 Mo. App. 275; *Chetwood* v. *Berriman,* 39 N. J. Eq. 203; *Myers* v. *Mut. Ins. Co.,* 99 N. Y. 1. These authorities make it clear that secrecy and concealment by an agent manifested in his conduct toward his principal, even if a fraud on the principal, will not charge a third person dealing with the agent unless notice thereof be brought home to such third person.

The $25,000 loan by Sinclair to Fall in June, 1923, occurring as it did several months after Fall had gone out of office and over a year after both the execution of the lease and the inferred bribery in connection therewith, can not be treated as a matter upon which to base the inference of bribery. *United States* v. *Hancock,* 133 U. S. 193.

Applying to the statute the evidence as to the insecurity of the oil in the Reserve, the two courts below held that the lease in controversy was authorized by the statute. The result is that, with the statute construed as this Court apparently, though indirectly, construes it in the *Pan American* case, both courts below found that the facts brought the lease within it.

The money appropriation should not be construed to limit the authority to exchange for containers necessary to conserve the fuel oil and other products.

We submit that the concurring findings of the two courts below upon the following points are in accord with the great weight of the evidence, certainly not contrary to the evidence, much less "clearly" against the weight of the evidence.

First: That under the Act of June 4, 1920, the information to Secretary Denby as to the danger of the loss of petroleum to the United States from Naval Reserve No. 3 by drainage, was such as to invoke the exercise of his judgment and discretion as to the appropriate action to be taken to prevent such loss; that in the exercise of such judgment and discretion the Secretary determined to make and made and executed the lease in controversy for the benefit of the United States and as the appropriate action to prevent the threatened loss; and that "the authority granted by the Act of June 4, 1920, is sufficient to authorize the lease."

Second: That the Act of June 4, 1920, committed to the judgment and discretion of the Secretary of the Navy whether to use, store, exchange, or sell the royalty oils accruing to the United States under the lease, and that in the exercise of such judgment and discretion the Secretary disposed of such royalty oils to the lessee, taking from the lessee in consideration therefor an agreement by the lessee that it would compensate the United States for the royalties in either of three ways as the United States

might elect, (1) in cash, (2) in fuel oil, (3) in other oil products suitable for use by the Navy. As to fuel oil elected to be received in exchange, the United States might take such oil without containers, or it might, but only to the extent necessary, also receive containers for the conservation of the fuel oil received. Therefore, that "the authority granted by the Act of June 4, 1920, is sufficient to authorize the . . . contract" for the disposition of the royalty oils.

Third: That the existing facts on February 9, 1923, were such as to authorize the Secretary of the Navy in the exercise of his judgment and discretion to exchange the royalty oils from the leased lands for fuel oils and other products suitable for naval use, together with containers necessary for the conservation thereof, and, therefore, that "authority granted by the Act of June 4, 1920, is sufficient to authorize the . . . contract" of February 9, 1923.

Fourth: That neither of the contracts here involved was upon an inadequate consideration to the United States.

Fifth: That there is no general statute requiring competitive bidding in negotiating leases of oil lands of the United States or in disposing of its royalty oils; that the absence of competitive bidding will not render invalid the lease or the agreement disposing of the royalty oils; that as to the agreements in relation to such containers as might be necessary "the Act of June 4, 1920 . . . was complete in itself and that it did not repeal nor was it dependent on other acts with relation to the public lands" . . .; that "This special statute, not repealing the general statutes, the two stand together, one as the law relating to a special thing, viz., the naval reserves—the other relating to general public land matters. It was therefore unnecessary that there be competitive bidding or advertising as to the making of the lease and contract,

and other statutes with relation to the method of transacting the general public business of the United States were not applicable to this situation, the special statute fully covering the same."

If, however, it be held on any ground that the agreement as to constructing storage facilities is invalid, we submit that this would not destroy the other valid agreements, but in that case every matter relating to the invalid agreements must be stricken from the contracts. This would leave to the United States full compensation and what it has contracted should be full compensation for the lease and for the royalty oils which it disposed of to the lessee.

Where promises are in the alternative, the fact that one of them is at the time or subsequently becomes legally impossible of performance, does not relieve the promisor from performance of the legal promise. *Yankton Indians* v. *United States,* 272 U. S. 351; *Jenson* v. *Toltec Co.,* 174 Fed. 86; *DaCosta* v. *Davis,* 1 Bos. & P. 242; *Stevens* v. *Webb,* 7 Car. & P. 60; 3 Williston, Contracts, § 1779.

We submit that the finding of the Circuit Court of Appeals wherein it differs from the finding by the District Court and upon which it reversed the decree of the District Court, namely, the finding that there was bribery of Secretary Fall by the Mammoth Oil Co., or its representative, is not sustained by any evidence, but consists of inference, drawn not from any fact or circumstance proved but from numerous other inferences, the basic inferences themselves having been improperly and illegitimately drawn.

Mr. Edward H. Chandler, with whom *Mr. Ralph W. Garrett* was on the briefs, for petitioners, Sinclair Pipe Line Co., and Sinclair Crude Oil Purchasing Co.

Messrs. Owen J. Roberts and *Atlee Pomerene* for the United States.

The lease and contract were fraudulent. Badges of the fraud and conspiracy were:

1. The policy of conserving the oil in the ground as long as possible, and of making only protective leases for offset purposes, was changed to one of exploiting the whole reserve.

2. The policy of leasing only pursuant to advertisement and competitive bidding was changed to private negotiation.

3. In the private negotiations with Sinclair, competition for the lease, for the purchase of the royalty oil, and for the erection of storage tankage, was eliminated.

4. The quit-claiming of placer claims known to be invalid was made a condition precedent to a lease, and only Sinclair was given any practicable opportunity to secure the claims.

5. Applicants other than Sinclair for leases were told no leasing was contemplated or were not given information on which a comparable bid could be made or time in which to make one.

6. Newspapers, the general public, senators and congressmen were denied information and affirmatively misled to avoid competition and opposition to the plan.

7. Negotiations were so shrouded with secrecy that even departmental subordinates did not know what was being done and did not know of the change in policy.

8. Subleases were clandestinely promised to two persons desirous of territory in the reserve.

9. The possibility of drainage was exaggerated and used as a justification for the lease, but not in good faith.

10. After doubts as to the legality of the plan were expressed by eminent attorneys, submission of the ques-

tion to the Attorney General or Solicitor for the Interior Department was studiously avoided.

11. The lease was drafted in secrecy in the office of Sinclair's attorney.

12. Fall dominated the negotiations leading up to the making of the lease.

13. The $230,500 Liberty Bond transaction, through the Continental Trading Co., was a bribe.

14. Neither Sinclair nor Fall was called by appellants to testify. Everhart claimed privilege against self-incrimination. Other witnesses with knowledge of important facts refused to testify.

15. Sinclair got a lease estimated to be worth in profits to his company over $33,000,000.

A public officer is held to the highest standard of good faith and good morals in all his transactions. He is not permitted to act from any motives other than the welfare and advantage of the Government. If motives of a private or a personal nature sway him, or if he is influenced by personal favoritism and offers preferential treatment to his friends, such action is immoral, reprehensible, and renders voidable the transactions to which he thereby purports to bind the Government. Persons dealing with a government officer are held to an equally strict standard of morality. They are affected with knowledge of the limitations upon his powers and may not benefit in case he exceeds his powers. They may not do anything to influence him to violate his duty to the Government. If they induce him to act, or merely know that he is acting, from personal motives or from a desire to favor them and give them preferential treatment, they cannot enforce a contract so made. Personal solicitation which results in preferential treatment constitutes corruption and collusion, rendering voidable contracts made as a result of it. *Crocker* v. *United States,* 240 U. S. 74; *Hume* v. *United States,* 132 U. S. 406; *Garman* v.

United States, 34 Ct. Cls. 237; *Wash. Irr. Co.* v. *Krutz,* 119 Fed. 279. These cases were cited and relied upon by this Court in *Pan American Co.* v. *United States,* 273 U. S. 456.

The collusion between Sinclair and Fall taints the entire transaction, and neither the Mammoth Oil Company, nor any of the other appellants in this case, is entitled to receive any benefit therefrom. The particular type of fraud with which we are concerned in the present case is collusion between an agent and a third party dealing with that agent. The fraud consists of improper motives upon which the third party induces the agent to act and as a result of which the agent does act in whole or in part. This is a different type of fraud from that which exists when false representations are made by one party to another upon which the second party relies and which are not in accordance with the truth.

In fraud arising from false representations the representation is an objective fact, the proof of which is within the knowledge of the injured party. The true state of facts is also capable of objective proof, which is usually not difficult to obtain. The only remaining element of proof necessary to establish the fraud is the knowledge of the falsity of the representation. It is clear that fraud of this type is more easily capable of proof than is fraud involving no objective representations.

The gist of fraud that consists solely in collusion is the inducing to act on the one side and the action on the other side from improper motives. Most of the dealings take place between the conspirators who have a common interest to continue to conceal their actions and their motives. There are no representations to the injured party which can be laid hold of as a basis of objective proof. The injured party must make up his proof out of a chain of circumstances which, taken as a whole, will show that the conspirators acted from improper motives.

When the proofs in the present case are examined in the light of proof that is reasonably possible, they are seen to be clear and convincing. The primary facts proved are substantially uncontradicted. There is no conflict in the testimony of witnesses as to the facts in evidence, nor is there any question as to the credibility of the Government's witnesses. The ultimate facts result from inferences arising upon the uncontradicted facts in evidence. Those inferences depend principally upon the common sense knowledge of the motives and actions of men in circumstances like the present.

It is not necessary that the fraud should be established beyond a reasonable doubt. It is merely necessary that the court should be of the opinion that a reasonable man would infer from the facts proved that the transaction was fraudulent. These principles for which we contend are supported by authority. *Rea* v. *Missouri,* 17 Wall. 532; *Glaspie* v. *Keator,* 56 Fed. 203; *Drake* v. *Stewart,* 76 Fed. 140; *Drennen* v. *Southern Fire Ins. Co.,* 252 Fed. 776; *Attorney General* v. *Pelletier,* 240 Mass. 264; *Lumpkin* v. *Foley,* 204 Fed. 372; *Ware* v. *United States,* 154 Fed. 577; *Castle* v. *Bullard,* 23 How. 172.

The silence of Sinclair is evidence of fraud. It is a fact to be considered not only in connection with The Continental Trading Company transaction, but also in connection with the negotiations for the lease and contract. Sinclair's silence is to be weighed in connection with his visit to Fall's home at Three Rivers, at the end of December, 1921, and with his curious appearance on the scene as the man of opportunity just prior to his offer of February 3, 1922. It is to be weighed in connection with his undue intimacy with Fall as further revealed by their many private conferences, their private "deals" over acreage for Shaffer and Hughes, and their private arrangement for the purchase and tender of the Pioneer and Belgo placer mining claims. Sinclair's silence must

be weighed in connection with the unusual and unique character of the entire negotiations between Fall and the man with whom he, as a government official, could deal in any honest way only at arms' length. Finally, but coincident with the unusual and suspicious chain of other circumstances, is Fall's proved accession of wealth from a source which reasonably narrows down to less than half a dozen men, of whom Sinclair was the only one shown to be then having dealings of any sort with Fall.

The weight to be given to the silence of a party to a cause is a matter of common sense rather than the result of a metaphysical concept. If no suspicious facts are proved, obviously no adverse inferences arise from the silence of a party. In direct proportion as the number and curious coincidence of suspicious facts increase, so also increases the weight to be given to a party's failure to explain such of those facts as are peculiarly within his control and knowledge. *Bilokumsky* v. *Todd,* 263 U. S. 149; *United States* v. *Commr. of Immigration,* 273 U. S. 103; *Runkle* v. *Burnham,* 153 U. S. 216; *Penna. R. R.* v. *Anoka Bank,* 108 Fed. 482; *Missouri &c. R. R.* v. *Elliott,* 102 Fed. 96; affd. 184 U. S. 695; *Glaspie* v. *Keator,* 56 Fed. 203; *Hansel* v. *Purnell,* 1 F. (2d) 266; 266 U. S. 617; *Attorney General* v. *Pelletier,* 240 Mass. 264; *United States* v. *Carter,* 217 U. S. 286; *The New York,* 175 U. S. 187; *Kirby* v. *Talmadge,* 160 U. S. 379; *Buick* v. *United States,* 275 Fed. 809; *Hill* v. *United States,* 234 Fed. 39; *Gulf Ry.* v. *Ellis,* 54 Fed. 481; *Hyams* v. *Calumet Min. Co.,* 221 Fed. 529; *Weed* v. *Lyons Pet. Co.,* 294 Fed. 725; affd. 300 Fed. 1005; *Nelson* v. *New York,* 131 N. Y. 4; *Keller* v. *Gill,* 92 Md. 190.

The finding of bribery as one of the elements of fraud, is sustained by the proofs, and is not based on improper inferences or presumptions. Appellants' contention that an inference or conclusion cannot be based upon a rebuttable inference or presumption must be limited in its

application to rebuttable inferences and presumptions of law. This proposition must be limited to such inferences as that men are to be considered honest and faithful to their duties until some evidence is offered that the men concerned were not honest and faithful; that a man exercised ordinary care for his own safety and was not guilty of negligence until some evidence to the contrary is introduced, etc. The cases cited by the appellants are of this type. *United States* v. *Ross,* 92 U. S. 281; *Manning* v. *Insurance Co.,* 100 U. S. 693; *Looney* v. *Met. Ry. Co.,* 200 U. S. 480. But proved facts and circumstances, although disconnected, may support an inference or conclusion involving intermediate inferences and conclusions of fact. Unless this were so a very large portion of cases which must be proven, if at all, by circumstantial evidence would fail. And almost invariably, fraud and conspiracy cases must be proven by circumstantial evidence. The oft repeated statements of courts that a wide latitude must be allowed in the introduction of evidence and circumstances in fraud and conspiracy cases would otherwise be practically valueless. *Cooper* v. *United States,* 9 F. (2d) 216; *Dimmick* v. *United States,* 135 Fed. 257; *State* v. *Fiore,* 85 N. J. L. 311; *Hinshaw* v. *State,* 147 Ind. 334; Wigmore, Evidence, 2d ed., vol. 1, § 41.

The lease and contract are illegal. The real purpose of the lease was to provide fuel depots on the Atlantic Coast and to obtain for the benefit of the United States the construction of a pipe line to serve this dome and other territory of the United States not set apart for the use of the Navy.

The alleged severability of the lease and contract: This lease was made by officers of the United States who on its behalf purported to grant the lease on conditions and covenants made by the lessee as a consideration for that grant. One of those covenants was, and the officers who

made the lease required that it should be, that the lessee upon demand would build steel tankage in exchange for the royalty oil. From analysis of the lease and contract, we believe that this Court will conclude in this case, as it did in the *Pan American* case, that: "The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption and fraud." It does not lie in the mouth of appellants to ask a court to rewrite the document and fasten upon the Government a lease wholly different from that which the officers of the Government attempted to make for it. *Hazleton* v. *Scheckells,* 202 U. S. 71; *McMullen* v. *Hoffman,* 174 U. S. 639; *Lingle* v. *Snyder,* 160 Fed. 627; *Western Ind. Co.* v. *Crafts,* 240 Fed. 1; *Townes* v. *Townes,* 270 Fed. 744; *Central R. R. of N. J.* v. *United Pipe Line Co.,* 290 Fed. 983; *Linebarger* v. *Devine,* 47 Nev. 67; *Orenstein* v. *Kahn,* 13 Del. Ch. 376; *LaFrance* v. *Cullen,* 196 Mich. 726; Williston, Sales, vol. 2, § 681; 13 C. J., § 471.

The making of the acquirement of the placer mining claims a part of the consideration was unlawful and voids the whole lease.

The award of the lease and contract without advertisement and competitive bidding was unlawful.

The lease and contract contemplated the erection of fuel depots not authorized by Congress.

The Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company are not entitled to any modification of the decree of the Circuit Court of Appeals. These appellants participated in the violation of the public policy of the United States involved in the lease to Mammoth Oil Company. Parties to illegal contracts subversive of the public policy of the Government are not entitled to any equity or to any consideration or to the value of their improvements. *Causey* v. *United States,* 240 U. S. 339; *United States* v. *Trinidad Coal Co.,* 137 U. S. 160; *Heckman* v. *United States,* 224 U. S. 413.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought by the United States against the petitioners in the District Court of Wyoming to secure the cancelation of an oil and gas lease made by the United States to the Mammoth Oil Company April 7, 1922, and to set aside a supplemental agreement made by the same parties February 9, 1923. An accounting and possession of the leased lands and general relief were also demanded. The complaint alleged that the lease and agreement were made without authority of law and in consummation of a conspiracy to defraud the United States. The District Court held that the transaction was authorized by the Act of June 4, 1920, c. 228, 41 Stat. 812, 813, found that there was no fraud, and dismissed the case. 5 F. (2d) 330. The Circuit Court of Appeals sustained that construction of the Act; but on an examination of the evidence, held that the lease and agreement were obtained by fraud and corruption, reversed the decree and directed the District Court to enter one canceling the lease and agreement as fraudulent, enjoining petitioners from further trespassing on the leased lands and providing for an accounting by the Mammoth Oil Company for all oil and other petroleum products taken under the lease and contract. 14 F. (2d) 705.

The lease covered 9,321 acres in Natrona County, Wyoming—commonly known as Teapot Dome—being Naval Reserve No. 3 created April 30, 1915, by an executive order of the President made pursuant to the Act of June 25, 1910, c. 421, 36 Stat. 847, as amended August 24, 1912, c. 369, 37 Stat. 497. The part of the Act of June 4, 1920 relied on to sustain the lease contains the following: "*Provided,* That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves . . . to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the

oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: . . . *And provided further,* That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed $500,000, are hereby made available for this purpose until July 1, 1922."

March 5, 1921, Edwin Denby became Secretary of the Navy and Albert B. Fall, Secretary of the Interior. May 31, 1921, the President made an order purporting to commit the administration of all oil and gas bearing lands in the naval reserves to the Secretary of the Interior, subject to the supervision of the President. The lease and agreement were signed for the United States by Fall as Secretary of the Interior and by Denby as Secretary of the Navy. The evidence shows that the latter was fully informed as to the substance of the transaction, and it is not necessary here to consider the validity or effect of the executive order.

The purpose and scope of the lease and agreement may be indicated by a statement of their principal features. The preamble to the lease stated that it was the duty of the Government to secure and store oil for the Navy; that the Government desired to avoid the loss of oil resulting from the drilling of wells outside the reserve, to create a market and receive the best prices obtainable for royalty oil from the Salt Creek field [adjoining the reserve on the north], to exchange royalty oil from the reserve for fuel oil for the Navy and to secure facilities for the storage of such fuel oil; and that the Government proposed to secure these objects by entering into a contract providing for the development and exploitation of the oil and gas within the reserve and for the construction of a pipe line, if necessary, for the transportation of royalty oil from the reserve and from the Salt Creek field,

The lease granted to the company the exclusive right to take and dispose of oil and gas so long as produced in paying quantities. The lessee agreed to drill test wells and, after their completion, fully to develop the reserve, to construct, or cause its nominee to construct, a common carrier pipe line [about 1,000 miles in length] from the leased lands to a line from the mid-continent field to Chicago; to pay as royalties specified percentages of products taken from the land; to purchase all royalty oil when and as produced, and in payment to set up an oil exchange credit to the lessor and issue certificates showing the amount and value of royalty oil received by lessee. It was provided that lessee would redeem the certificates by giving lessor credit on its obligations to lessee for the construction of tanks to store fuel oil for the Navy under the agreement contained in the lease for the exchange of crude oil for fuel oil storage, or by delivering to lessor fuel oil or other products of petroleum for the use of the Navy, or by cash under certain conditions. And it was agreed that the lessee, when requested by the lessor, would construct or pay the cost of constructing steel tanks necessary for such storage; that lessor would pay in oil certificates of face value equal to such cost; that in exchange for crude oil lessee would deliver fuel oil and other petroleum products for the Navy at places * on the Atlantic Coast, the Gulf of Mexico, and at Guantanamo Bay, Cuba. Lessee agreed diligently to drill and continue operation of oil wells unless by the Secretary of the Interior

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* Houston, Tex.	Boston, Mass.	Norfolk, Va.
Pensacola, Fla.	Melville, R. I.	Philadelphia, Pa.
New Orleans, La.	Woods Hole, Mass.	Bath, Me.
Charleston, S. C.	New Haven, Conn.	Rockland, Me.
Annapolis, Md.	Guantanamo Bay, Cuba.	Quincy, Mass.
Indian Head, Md.	Key West, Fla.	Block Island, R. I.
New York, N. Y.	Mobile, Ala.	New London, Conn.
Machias, Me.	Washington, D. C.	Bridgeport, Conn.
Portsmouth, N. H.	Baltimore, Md.	Fall River, Mass.

permitted temporarily to suspend operations. And it was provided that, with the consent of the Secretary of the Interior, the lease might be terminated. By a separate agreement dated December 20, 1922, the lessee designated, and the lessor accepted, the Sinclair Pipe Line Company as the nominee of lessee to construct the pipe line, having a daily capacity of 40,000 barrels.

The supplemental agreement of February 9, 1923, relates to storage tanks to be provided by the lessee. It deals with four projects covering construction work at Portsmouth, Melville, Boston and Yorktown. The total capacity—some expressed in tons and some in gallons—to be constructed at these places was sufficient to store 2,550,000 tons of fuel oil, 37,500 tons and 625,000 gallons of Diesel oil, 26,500 tons and 2,330,000 gallons of gasoline, 13,800 tons and 1,161,000 gallons of lubricating oil. The lessee agreed to provide the tanks and fill them in exchange for royalty oil certificates. The Government was not obligated to lessee otherwise than to deliver it oil certificates for redemption in accordance with the lease, and until the agreement was fully performed all certificates received by the Government were to be used for constructing and filling storage for fuel oil and other petroleum products. And it was further provided that upon completion of these projects other facilities for the storage of petroleum products required by the Navy were to be constructed and filled by the lessee.

The evidence shows that the storage facilities to be furnished under the lease were to be complete reserve fuel stations, such as are known in the Appropriation Acts as "fuel depots"; that the arrangement to use royalty oil to pay for such construction was made for the purpose of evading the requirement that the proceeds of the royalty oil, if sold, be paid into the Treasury, and to enable the Secretary of the Navy to locate, plan and have constructed fuel stations that had not been authorized by

Congress; that the approximate cost of construction so to be done on the Atlantic Coast would be at least $25,000,000, of that on the Pacific under arrangement with the Pan American Petroleum and Transport Company $15,000,000, and for the whole program—including the products to be put into these fuel depots when constructed—a little in excess of $100,000,000. The cost of the pipe line is not included in any of these figures. It was not deemed to be a facility merely for the development of the reserve; but was desired by those acting for the Government for the transportation of oil obtained in that part of the country, to create competition in the oil market, and as an instrumentality for national defense in case of war.

A construction of the Act authorizing the agreed disposition of the reserve would conflict with the policy of the Government to maintain in the ground a great reserve of oil for the Navy. Joint Resolution, approved February 8, 1924, 43 Stat. 5. It would restore to the Secretary of the Navy authority, of which he had recently been deprived, to construct fuel depots without express authority of Congress. Act of August 31, 1842, 5 Stat. 577, (R. S. § 1552); Act of March 4, 1913, 37 Stat. 891. It would put facilities of the kind specified outside the operation of the general rule prohibiting the making of contracts of purchase or for construction work in the absence of express authority and adequate appropriations therefor. R. S. §§ 3732, 3733; Act of June 12, 1906, 34 Stat. 240, 255; Act of June 30, 1906, 34 Stat. 697, 764. It would be inconsistent with the principle upon which rests the law requiring purchase money received on the sale of government property to be paid into the Treasury. R. S. §§ 3617, 3618. While, in order to make the petroleum products available for the Navy, the Act deals with reserve lands as a separate class, there is nothing to indicate a legislative purpose to reverse the

policy of conservation or to relax the safeguards as to fuel depots and contracts for their construction, set by prior legislation. The authority to "store" or to "exchange" does not empower the Secretary of the Navy to use the reserves to regulate or affect the price of oil in the Salt Creek field or to induce or aid construction of a pipe line to serve that territory. And it does not authorize the Secretary to locate the fuel stations provided for or to use the crude oil to pay for them. The Mammoth Oil Company insists that, even if other elements be held unauthorized, the transaction may be sustained as a lease granting the right to take the oil and gas in consideration of the development of the property and delivery of the royalty oils or the equivalent in cash. That view cannot prevail. The percentages of the product to be retained by the lessee includes the consideration, however indeterminate in amount, for the construction of the pipe line. Presumably, the lessee's undertaking to provide it induced the lessor to accept less than otherwise would have been asked or given. Cf. *Hazelton* v. *Sheckells*, 202 U. S. 71.

So far as concerns the power under the Act of June 4, 1920 to make them, the lease and agreement now before the court cannot be distinguished from those held to have been made without authority of law in *Pan American Petroleum and Transport Company* v. *United States*, 273 U. S. 456. And the United States is entitled to have them canceled.

Were the lease and supplemental agreement fraudulently made?

The decisions below are in conflict, and we have considered the evidence to determine whether it establishes the charge. The complaint states that the lease and agreement were made as the result of a conspiracy by Fall and H. F. Sinclair to defraud the United States; that Fall acted for the United States and Sinclair acted for

the Mammoth Oil Company; that the negotiations were secret and the lease was made without competition; that responsible persons and corporations desiring to obtain leases were by Fall in collusion with Sinclair denied opportunity to become competitors of the Mammoth Company; that a company known as the Pioneer Oil Company asserted a mining claim to lands in the reserve; that the claim was worthless and known to be so by Fall; that he had Sinclair procure a quitclaim deed covering the valueless claim and, then, to make it impossible for others to compete with Sinclair's company, Fall made its transfer condition the granting of the lease; that Fall agreed with one Shaffer that Sinclair would cause a part of the leased lands to be set aside for the benefit of Shaffer, and required Sinclair, in order to get the lease for the Mammoth Company, to agree that Shaffer should have a sublease on some of the land; that before and after the making of the lease Fall kept the negotiations and execution secret from his associates, the Congress and the public. And, in general terms, the complaint charges that Fall and Sinclair conspired to defraud the Government by making the lease without authority and in violation of law and to favor and prefer the Mammoth Company over others.

As is usual in cases where conspiracy to defraud is involved, there is here no direct evidence of the corrupt arrangement. Neither of the alleged conspirators was called as a witness. The question is whether the disclosed circumstances prove the charge. When Fall became Secretary, Reserve No. 3 had already attracted the attention of oil operators. His predecessor, Secretary Payne, had arranged to offer highest bidders 15 leases in the Salt Creek field. These covered areas ranging from 160 to 640 acres, amounting in all to 6,400 acres. The royalties averaged 28.76 per cent. June 15, 1921, the leases were auctioned. Bonuses offered in excess of the

specified royalties amounted in all to $1,687,000, and the leases were granted on that basis. That field was very productive. The reserve compared favorably with it, and was considered very attractive by all having knowledge of the structure. Obviously oil men would be interested in the opening of the reserve and the putting of its product on the market.

From the beginning Fall was keen to control the leasing of the naval petroleum reserves. Commander H. A. Stuart had been put in charge of naval reserve matters by Secretary Daniels; he continued as special aide to Denby, and was well qualified for that service. Early in April, 1921, Fall asked Assistant Secretary Edward C. Finney, who had long been in the Interior Department, to suggest someone who could handle naval reserve matters. Finney recommended, and Fall appointed, Doctor W. C. Mendenhall of the Geological Survey. Early in May, Fall had a memorandum prepared by Finney to disclose what power or authority in respect of the reserves could be delegated to Fall. Finney reported that the President might commit to the Secretary of the Interior the authorization of such additional wells or leases within the naval reserves as the President by § 18 of the Leasing Act was empowered to permit or grant; that under the Act of June 4, 1920, the Secretary of the Navy might request him to handle the conservation, development and operation of the naval reserves. And May 11, Fall sent Denby a letter inclosing for his approval a draft of a proposed executive order and a form of letter addressed to the President to be signed by Denby, requesting that the order be made. Fall said: "Referring to our conversation yesterday, and to your suggestion to the President that the Secretary of the Interior be placed in charge of administration of the laws relating to naval reserves, I am submitting herewith for your consideration a brief memorandum stating the facts and law with respect to naval reserves, a tentative form

of letter for your signature if it meets with your approval, and a form of Executive order for the President's signature if it meets your suggestions of yesterday . . . If they meet with your approval and no changes occur to you, kindly return them with your approval, in order that the matter may be taken up with the President." While this letter contains language calculated to indicate that Denby initiated the matter, the context and attending facts clearly show that Fall was eager to get the authority proposed to be given him.

Denby was not called as a witness, but the circumstances indicate that he intended to be passive and let Fall dominate. He sent Fall's form of executive order to Assistant Secretary Roosevelt and the Chief of the Bureau of Engineering, Admiral R. S. Griffin. After consideration of the matter by them and other officers of the Navy, including Commanders Stuart, J. F. Shafroth and E. A. Cobey, the Assistant Secretary told Denby that he thought that the property should not be turned over to the Interior Department. Denby replied that the matter had been decided by the President, Fall and himself. Later the Assistant Secretary took to Denby a suggestion, prepared by him and his associates, for the amendment of the proposed order. Denby said: "If you can get Fall to agree to this modification, then it will be all right with me." Fall agreed to the change, and the President signed the form of order as amended. Its pertinent provisions follow: "The administration and conservation of all oil and gas bearing lands in naval petroleum reserves . . . are hereby committed to the Secretary of the Interior subject to the supervision of the President, *but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in coöperation with the Secretary or Acting Secretary of the Navy.*" We italicize words added as a result of the suggestion of Denby's subordinates. The executive

order as signed by the President was what Fall wanted and, so far as concerns the matters here involved, it was not substantially different from the draft he submitted to Denby.

Soon after the order was made, 22 offset wells in Reserve No. 1 were given to companies represented by E. L. Doheny and one McMurray, respectively. In connection with that matter Fall had some trouble with Mendenhall and Stuart and expressed himself as "dissatisfied with both of them." Thereafter, neither of them was given anything to do in respect of reserve leases. July 8, 1921, Fall wrote Doheny a letter containing the following: "There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases, under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau of his department, but only with himself, and such consultation will be confined strictly and entirely to matters of general policy." This exultant declaration that he was in position to handle these vast properties as he pleased discredits Fall. His desire to get control of the reserves and then so proclaim that he had it strongly suggests that he was willing to conspire against the public interest. And that inference is confirmed by his subsequent conduct.

By letter to Denby of July 23, Fall suggested the thought that royalty oil might be used to pay for fuel depots to be located and planned by the Navy. That idea seems not to have originated in the Navy. Such use of royalty oil was an essential element in any arrangement involving the prompt exhaustion of the reserves. It was the foundation of the scheme culminating in the lease. Denby by letter to Fall of July 29 indicated his

acquiescence. Soon thereafter Fall left Washington for the West, declaring that he was going to discuss the matter with oil men "with the idea of working up some such arrangement." He returned about the middle of October. In the meantime Admiral John K. Robison was appointed to succeed Admiral Griffin as Chief of the Engineering Bureau. Denby directed Robison to take personal charge of all naval petroleum matters. Commander Stuart was relieved from all duties in reference to them. The record shows no reason for the removal of Stuart, but it does appear that Fall favored the change and that Denby knew it.

Immediately after he was given charge, Robison investigated and found that Reserves Nos. 1 and 2 were suffering loss from drainage and that Reserve No. 3 was not. He testified that he thought the latter pretty secure but not absolutely so. He read Fall's letter of July 23, suggesting the use of royalty oil to pay for storage tanks, and he made working arrangements with Fall, which were confirmed by a letter of October 25, prepared by Robison and signed by Denby and sent to Fall. They agreed that Fall was to control the making of all leases for the drilling of wells in the naval reserves and for the disposition of the products; that he would have necessary offset wells drilled in Reserves Nos. 1 and 2, but that the development of Reserve No. 3 would not be undertaken except to protect it against depletion by others; that the Navy was to receive fuel oil for royalty oil; that so much of the royalty oil as was not exchanged for fuel oil would be used to obtain storage at places to be designated by the Navy; and that the terms of the conversion should be submitted to the Navy for approval as to qualities, deliveries, engineering and other features involved.

Denby did not actively participate; but, in conferences with Fall, he was represented by Robison. Fall personally conducted the negotiations with Sinclair. And

he contemporaneously arranged with Doheny the contract that was set aside for fraud in the *Pan American Case, supra.* Under the Secretary, Finney usually acted for the United States in making oil and gas leases, and he was authorized to sign them. But he was not consulted as to the terms of the naval reserve leases made to the Mammoth Company represented by Sinclair or to the Pan American Petroleum and Transport Company represented by Doheny. Robison through Fall undoubtedly exerted influence as to the provisions for the pipe line and fuel stations, but Fall acted for the United States and dominated in all matters substantially affecting the value of the lease. And it is significant that by the terms of the lease the Secretary of the Interior was authorized to permit the lessee temporarily to suspend production or to assign or terminate the lease.

November 30, at a meeting of the Secretary's Council, consisting of important officers in the Navy, Robison advised, and it was decided, that the oil reserves should not be used to supply fuel oil for current use. He urged that leases be made and royalty oil exchanged for fuel oil and storage constructed by the lessees at places to be designated by the Navy. Denby at first queried whether the exchange was authorized by law, and Robison called for the advice of the Judge Advocate General of the Navy. He answered affirmatively and, in the course of his opinion, said: "The authority granted 'to exchange' is unrestricted; i. e. the Act does not specify nor limit what may be taken in exchange for the oil and its products." Denby approved the opinion and authorized the proposed exchange. Robison prepared a letter which Denby signed and sent to Fall, quoting the Judge Advocate General, and stating that Denby desired the Interior Department to make exchanges of crude oil for fuel oil and storage and that Robison had been designated to handle the details.

Then Fall went to his ranch at Three Rivers, New Mexico, where, December 31, came Sinclair and his counsel, J. W. Zevely, to see him—as the latter testified—on some business connected with Osage Indian leases. They remained two days. The showing as to what transpired concerning the Teapot Dome is meager. The record contains no statement from Fall or Sinclair. H. F. Bain, Director of the Bureau of Mines, was there for a day, but the leasing of the reserve was not mentioned in his hearing. Zevely testified that he was not sure whether the subject was mentioned in his presence, but he thought inquiry was made of Fall as to whether he would lease the Teapot Dome and that Fall said he was having an investigation made "and upon that report he would probably determine whether or not he would lease" it. Nothing more is directly disclosed. But, soon after Fall and Sinclair met at the ranch, Fall caused his office force to investigate pending claims to land in the reserve and directed a report to be made to him on his return. Evidently he was considering leasing the reserve as a whole.

Fall reached Washington January 27 and, after conference with Robison, it was decided to develop all of Reserve No. 3. He sent for Sinclair and Zevely and had Robison tell them what would be necessary in any proposal for a lease. Robison told Sinclair that the whole reserve should be developed, that a pipe line adequate to serve the field should be constructed, and that royalty oil should be used to obtain fuel oil and to pay for storage facilities. And February 3, Sinclair wrote to Fall, stating that he was willing to take out all the oil in the reserve on a royalty basis and specifying features substantially the same as those suggested to him by Robison. He also proposed to quiet all outstanding claims and so enable the Government to make one lease covering the whole reserve. His letter argued against granting leases by auction, as-

serted that the reserve was being drained, and insisted that it was better to have oil stored where needed than to keep the reserve underground. On receipt of the letter, Fall conferred with Sinclair and directed Arthur W. Ambrose, chief petroleum technologist of the Department, to give him an estimate of the quantity of oil in the reserve and "some idea as to the possibilities of drainage." February 18, Ambrose reported that he estimated 360,270,000 barrels in the Salt Creek field and 135,050,000 barrels in the reserve. His report disclosed no immediate danger of drainage but only a possibility of loss "during the next six or seven years." About that date Fall called Ambrose into his office where Sinclair and Zevely were and, outlining certain provisions he wanted, directed that a draft of lease be prepared. The work of preparation required two or three weeks, and most of it was done in Zevely's office in Washington. Questions concerning its provisions arising from time to time were referred to Fall and Sinclair; they settled all the terms of the lease. The draft was not submitted to any lawyer in the Interior Department.

The Pioneer Oil and Refining Company and the Societe Belgo-Americaine des Petroles du Wyoming had asserted placer mining claims to lands in the reserve. In 1917, the Department fully investigated and found these claims were without merit. In 1920, Secretary Payne held them invalid and denied application for a lease. In March, 1921, Assistant Secretary Finney dismissed claimants' petition for rehearing. Later, they filed a petition to invoke the supervisory power of the Secretary. Answering an inquiry from Fall, Finney told him that the claims "had no validity and no standing." The last petition had not been heard when Fall and Sinclair met at the ranch. The report that Fall called for was ready before he returned to Washington; it stated that there were no claims deserving serious consideration. Obviously Sinclair's pro-

posal to quiet outstanding claims was the result of an understanding with Fall.

February 28, 1922, Sinclair caused the Mammoth Company to be organized. It promptly obtained from the Pioneer and Belgo companies quitclaim deeds of all the reserve lands, and agreed with them that, in the event of obtaining a lease covering the lands, it would pay them $200,000 within 18 months and $800,000 more out of one-third of the value of the gross production less royalties. March 11, Sinclair wrote Fall submitting the Mammoth Company's formal application for a lease. He said that, if the lease were granted, he would become owner of all the capital stock of the company and would personally guarantee performance of the contract. He submitted a form of lease—presumably that already prepared in coöperation with Fall—and inclosed the company's quitclaim deed to the United States of all that was conveyed to it by the Pioneer and Belgo companies. The record shows that, after he knew that the Mammoth had obtained these deeds, Fall told some who sought to lease the reserve that he would require the lessee to satisfy or clear up outstanding claims. In March, after much time had been spent in preparing the lease, Fall told a representative of a company seeking a lease that he was not ready at that time to consider leasing the reserve and that, if he did so decide, he would notify the applicant. To one acting for another company, who called about April 10 to submit an offer for a lease, Fall indicated that he would entertain a bid and said that he would be glad to see representatives of the company at Three Rivers. The lease had been signed by Fall April 7.

March 16, 1922, John C. Shaffer called on Fall concerning an earlier application for a lease covering a specified tract of 600 acres in the reserve. Fall said he was then negotiating with Sinclair for a lease covering the reserve. Shaffer insisted upon having some of it, and Fall said he had told Sinclair to set aside 200 acres for Shaffer. And

when Shaffer demanded more, Fall advised him to see Sinclair, adding, "I think you will find him a very reasonable man, and you probably will make satisfactory arrangements with him." Shaffer went to New York and saw Sinclair. The latter said that Fall had told him to reserve 200 acres for Shaffer. Shaffer demanded 600 acres, protracted negotiations between them followed, and it does not appear that any agreement was ever reached. Fall's arrangement with Sinclair for a sublease to Shaffer was extraordinary and indicates that he had favored the Mammoth Company and that Sinclair on that account had assumed obligations not expressed in the lease.

About March 30 a rough draft of the lease was given Robison. April 7, Fall signed as Secretary of the Interior and "for the Secretary of the Navy." It was thought desirable, whether necessary or not, that Denby should sign; and, about April 12, he did so. Then Fall, about to leave for New Mexico, told Finney that the lease had been executed, and locked it and copies in his desk. He said that "he didn't want it to get out" until after the consummation of the contract (that set aside in the *Pan American* case) for the construction of storage tanks, etc., at Pearl Harbor. He wrote Denby inclosing a copy and stating that delivery of the lease had been made to the lessee; that he had instructed his office force to give out nothing; that he was particularly anxious that no details should be disclosed pending the completion of the other contract. And, in order to support his refusal to furnish a senator information concerning these contracts, Fall insisted that they should not be given out because military plans were involved. After Fall left, inquiries were made at the Department, but all information was withheld. When demand became more insistent, Fall wired his office to notify Sinclair to furnish a surety company bond "in view of congressional agitation" instead of Sin-

clair's personal bond theretofore accepted. About April 21, information concerning the lease was given in response to a Senate resolution. There was never any legitimate reason for secrecy.

The Mammoth Company insists that the lease was made to protect the reserve from loss by drainage. The trial court did not pass upon the matter. The Circuit Court of Appeals found there was a remote but not immediate danger. It said (p. 719): "The drainage danger was unquestionably not imminent enough to force immediate action in the leasing of the entire property." That fact is satisfactorily established. A discussion of the evidence is not necessary. The circumstances, terms of the arrangement and testimony of witnesses show that the lease and agreement were not made to prevent drainage. While the negotiations were pending, Fall and Sinclair indicated that they thought such danger existed, but the evidence warrants a finding that their expressions were made in bad faith to make it appear that there was a reason for the exhaustion of the reserve and the proposed disposition of its products.

In January, 1922, Fall was informed that counsel for certain oil companies had held that the use of royalty oil to pay for fuel depots was not authorized by law. He expressed fear that, because of the "question as to the legality of bartering of royalty oil for storage, people would not bid for this contract and lease in California." But he refused to submit the question to the Attorney General; and, as a reason for not taking such legal advice, said that "the chances were at least even, or at least there was some chance" that an adverse opinion would be given "and if the Attorney General signed such an opinion . . . he [Fall] would be estopped from doing anything." And, on April 12, the day that Denby signed the lease, Fall asked him to procure the adoption of an amendment to the pending naval appropriation bill, providing

that storage for fuel oil from the reserves might be obtained by exchange of oil or by use of cash received for royalty oil sold. Fall sent Denby a draft of the amendment and undoubtedly thought its adoption would authorize the exchange of oil for the storage facilities contemplated by the lease. Under the circumstances, his failure to submit the lease to the Attorney General or to any lawyer in his own Department indicates that he knew that the transaction was liable to be condemned as illegal, and that, without regard to the law, he intended to put it through.

Shortly after the making of the lease, Fall received from a hidden source a large amount of Liberty Bonds, and others were used for his benefit. The substance of the disclosed circumstances follows. A. E. Humphreys controlled two oil producing companies. H. M. Blackmer was chairman of the board of the Midwest Refining Company, a subsidiary of the Standard Oil Company of Indiana. The latter and the Sinclair Consolidated Oil Corporation owned share and share alike the Pipe Line Company and Purchasing Company. November 15 [1921], Humphreys, his counsel Charles S. Thomas, Blackmer, Sinclair, and James E. O'Neil, president of the Prairie Oil and Gas Company, met in New York. It was there understood that Humphreys' companies would sell to Blackmer at $1.50 a barrel half their production up to 33,333,333 barrels, and also that they would sell at prices current in the field to the Prairie Company and the Purchasing Company half the production after delivery of the oil so sold to Blackmer. The same persons and R. W. Stewart, president of the Standard Oil Company of Indiana, met the next day. It was then understood that, instead of Blackmer, the Continental Trading Company Ltd. would be the purchaser in the first transaction and that performance on its part would be guaranteed by the Prairie Company and the Purchasing Company. The

papers were so drawn. On the same day, Henry Smith Osler, a barrister of Toronto, caused application to be made to the Secretary of State for Canada for the incorporation of the Continental Company. The next day, he attended a meeting of the same persons and executed the contract on behalf of that company. Its performance was guaranteed as arranged, O'Neil acting for the Prairie Company and Sinclair and Stewart for the Purchasing Company. At the same time the Continental Company and these guarantors made a contract by which the latter bought all the oil so purchased by the Continental Company and assumed all its obligations. On the price basis specified, the gain of the Continental would be at least 25 cents per barrel and under some circumstances might be more. The Continental was to receive payments for the oil on the tenth of each month, but was not bound to pay the producers before the fifteenth. So it was assured profit of at least 25 cents per barrel without financing or effort of any kind. As permitted by Canada law, it issued share warrants to bearer with dividend coupons attached; except for qualifying shares, it put out no stock, did no other business, and kept no accounts. All its financial transactions were handled by the New York agency of the Dominion Bank of Canada. There was found no record disclosing who were financially interested in the company or entitled to dividends paid by it. Pursuant to Osler's instructions, the New York agency on April 13 and April 17, 1922, bought Liberty Bonds of $300,000 par value; and, on May 8 following, Osler as president of the Continental Company gave the agency a receipt for Liberty Bonds of that amount. There were other similar transactions; and, between February 1922 and June 1923, like purchases and deliveries amounted to more than $3,000,000. In May, 1923, the Continental Company assigned its contract with the Humphreys' companies to its guarantors for $400,000. Shortly afterwards, it was dissolved, and all its records were destroyed.

May 29, 1922, at Pueblo, Colorado, Fall's son-in-law, M. T. Everhart, had $230,500 in Liberty Bonds. Of that amount, $200,000 were, by the numbers thereon, conclusively shown to have been included in the lots purchased by the New York agency, April 13 and April 17, and receipted for by Osler, May 8. Everhart gave the First National Bank of Pueblo bonds for $90,000 to be kept for Fall. He sold the balance to the M. D. Thatcher Estates Company at par and accrued interest. Fall and Everhart owned all the stock of the Tres Ritos Cattle and Land Company. The Thatcher Company had loaned the cattle company $10,000, Fall $15,000, and Everhart $83,000, and for security held all the stock of that company. Out of the proceeds of the bonds, Everhart paid these debts. The balance was distributed to the company, Fall, and Everhart. Out of the $90,000 in bonds given to the bank for Fall, $20,000 were deposited to the credit of the cattle company, and the rest was sent to Fall. In October and November, 1922, he sold $20,000 in Texas; and, in May, 1923, $50,000 in New Mexico. The Government called Everhart as a witness; but, invoking the rule against compulsory self-incrimination, he declined to give any information as to where he got the bonds.

Humphreys and his counsel testified but were unable to disclose who were financially interested in the Continental Company. Blackmer and O'Neil went to France; and, on the application of the Government, letters rogatory issued, but they refused to testify. Subpoena was issued for Stewart, but the marshal returned that he could not be found. Commissioners were appointed to take the deposition of Osler in Canada. He was sworn, but declined to disclose who caused him to organize the Continental Company or to give information as to its owners or the distribution of its assets. As ground for the refusal, he asserted that the information called for was privileged because communicated to or obtained by him in the course

of his employment as a professional legal advisor, and that the company and its officers were his confidential agents for the better performance of his duties to his client. Application was made to the Supreme Court of Ontario to compel him to testify. That court held he must answer, 56 O. L. R. 307; and its judgment was affirmed on appeal. 56 O. L. R. 635. The District Court, on defendants' objections, refused to delay the trial pending final decision in the Canada courts and thereafter refused to reopen the case in order to get Osler's testimony.

The creation of the Continental Company, the purchase and resale contracts enabling it to make more than $8,000,000 without capital, risk or effort, the assignment of the contract to the resale purchasers for a small fraction of its probable value, and the purpose to conceal the disposition of its assets make it plain that the company was created for some illegitimate purpose. And the clandestine and unexplained acquisition of these bonds by Fall confirms the belief, generated by other circumstances in the case, that he was a faithless public officer. There is nothing in the record that tends to mitigate the sinister significance attaching to that enrichment.

Fall ceased to be Secretary, March 4, 1923. Shortly afterwards, Sinclair gave him $25,000 under these circumstances. Sinclair, about to go to Russia on business, had Zevely arrange with Fall to meet him there. Fall was given $10,000 for expenses; and, May 26, 1923, Sinclair directed his secretary, Wahlberg, to give Zevely bonds for $25,000 if the latter asked for them. A few days later, Zevely obtained the bonds and, at Fall's request, had them sent to the First National Bank of El Paso. Zevely wrote the bank that the package belonged to Fall. By direction of Fall, the bank sold the bonds and gave him credit for the proceeds, $25,671.36. Zevely testified concerning the transaction before the Senate Committee on Public Lands, and that testimony was introduced at the trial by the

defendants. Its substance was that Zevely went to New Mexico to see Fall because he did not want to write about the matter; that, in addition to the expense money, Fall wanted $25,000 to buy one or two small ranches there; that Zevely so reported to Sinclair, who said: "If he does, you will have to let him have it"; that later Zevely had Wahlberg, who did not know the bonds were for Fall, send them to the designated bank; that the bonds were not given as a fee but as a loan from Sinclair; that, after Fall's return from Russia, he gave Zevely a note for $25,000 which the latter still held. Fall allowed the proceeds of the bonds to remain in the bank for a long time, and it does not appear that he ever bought the ranches. It is obvious that this was not a straightforward transaction. Coming so soon after the supplemental agreement made to perfect and carry out the scheme, it strengthens and confirms the inference that Fall had been willing to conspire to defraud the United States; and, taken in connection with other circumstances disclosed, it is persuasive evidence of such a conspiracy between him and Sinclair.

Familiar rules govern the consideration of the evidence. As said by Lord Mansfield in *Blatch* v. *Archer* (Cowper 63, 65): "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." The record shows that the Government, notwithstanding the diligence reasonably to be expected, was unable to obtain the testimony of Blackmer, O'Neil, Stewart, Everhart, or Osler in respect of the transaction by which the Liberty Bonds recently acquired by the Continental Company were given to and used for Fall. And the record contains nothing to indicate that the petitioners controlled any of them, or did anything to prevent the Government from obtaining their testimony, or that they or the evidence they might have given was within petitioners' power. But the failure of

Sinclair to testify stands on a different basis. Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge, the United States was not required to call the principal representative of the company. His silence makes strongly against the company. It is as if he personally held the lease, were defendant, and failed to testify. The guiding considerations by which the proper significance of such silence is to be ascertained were well stated by Chief Justice Shaw in the celebrated case of *Commonwealth* v. *Webster,* 5 Cush. 295, 316: "Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution." While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case (*Northern Railway Company* v. *Page,* 274 U. S. 65, 74), it justly may be inferred that he was not in position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case. *Runkle* v. *Burnham,* 153 U. S. 216, 225; *Kirby* v. *Tallmadge,* 160 U. S.

379, 383; *Bilokumsky* v. *Tod,* 263 U. S. 149, 154; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 111; *Clifton* v. *United States,* 4 How. 242, 247; *Missouri, K. & T. Ry. Co.* v. *Elliott,* 102 Fed. 96, 102. As to facts appearing to have been within the knowledge or power of Sinclair, we find that the evidence establishes all that it fairly and reasonably tends to prove.

The complaint did not allege bribery; and, in the view we take of the case, there is no occasion to consider and we do not determine whether Fall was bribed in respect of the lease or agreement. It was not necessary for the Government to show that it suffered or was liable to suffer loss or disadvantage as a result of the lease or that Fall gained by or was financially concerned in the transaction. *Pan American* case, *supra,* p. 500. It requires no discussion to make it plain that the facts and circumstances above referred to require a finding that pending the making of the lease and agreement Fall and Sinclair, contrary to the Government's policy for the conservation of oil reserves for the Navy and in disregard of law, conspired to procure for the Mammoth Company all the products of the reserve on the basis of exchange of royalty oil for construction work, fuel oil, etc.; that Fall so favored Sinclair and the making of the lease and agreement that it was not possible for him loyally or faithfully to serve the interests of the United States or impartially to consider the applications of others for leases in the reserve, and that the lease and agreement were made fraudulently by means of collusion and conspiracy between them.

The lease gave the Mammoth Company the right to construct tanks and other operating facilities on the reserve. In January 1923, the petitioner, Sinclair Crude Oil Purchasing Company, bought from that company the tanks already constructed and others being built thereon. It used them to store Salt Creek royalty oil that it bought

from the Government. It claims that it relied on the validity of the lease and became the owner of the tanks as licensee and grantee of the lessee and entitled to maintain them in all respects as the lessee was entitled to do under the lease. It contends that the Circuit Court of Appeals erred in directing it to be restrained from further trespassing upon the reserve, and that in any event it should be given opportunity to remove its property. But the Purchasing Company is presumed to have known that no law authorized the making of any such lease. The existence of that arrangement for the exhaustion of the reserve was calculated to excite the apprehensions of one considering such a purchase and put him on his guard rather than to give assurance of safety. The use of such tanks to take oil from the reserve was a part of the illegal scheme. Moreover, the Purchasing Company was owned half and half by the Sinclair Consolidated Oil Corporation and the Standard Oil Company of Indiana. Sinclair was chairman of the board of the former, and Stewart held like position in the latter. Shortly before the Purchasing Company bought the tanks, these chairmen acted for and controlled it in respect of most important transactions. That and other disclosed circumstances are sufficient to impute to it Sinclair's knowledge of the conspiracy to defraud by which the lease was obtained. It is clear that, in respect of the use and removal of these tanks, the Purchasing Company is in no better position than the Mammoth Company would have occupied, if it owned them.

The Sinclair Pipe Line Company, as lessee's nominee to build the pipe line provided for in the lease, expended a large amount in constructing on the reserve a pumping station, pipe line and other equipment necessary for the transportation of the oil therefrom. It asserts that it relied on the validity of the lease, had no knowledge of

any fraud in its procurement and made these expenditures in good faith. It contends that it should have opportunity to procure from governmental authorities a right to use the reserve lands for the operation of the pipe line and equipment thereon; and, failing to get a right of way or easement for that purpose, it should be allowed to remove its property. That company was also owned half and half by the Consolidated Company and the Standard Company. It was a mere nominee to do some of the work specified in the lease to be performed by the lessee. It is chargeable with notice that the use of reserve oil to procure the construction of the pipe line was a part of the plan for the unauthorized exhaustion of the reserve; that such use furthered the violation of law and was contrary to the established conservation policy. The Pipe Line Company stands on no better ground than the lessee would have occupied if it had made the improvements in question.

The tanks, pipe line and other improvements put upon the reserve for the purpose of taking away its products were not authorized by Congress. The lease and supplemental agreement were fraudulently made to circumvent the law and to defeat public policy. No equity arises in favor of the lessee or the other petitioners to prevent or condition the granting of the relief directed by the Circuit Court of Appeals. Petitioners are bound to restore title and possession of the reserve to the United States, and must abide the judgment of Congress as to the use or removal of the improvements or other relief claimed by them. *Pan American* case, *supra*, p. 510.

Decree affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE STONE took no part in the consideration or decision of this case.

SMALLWOOD ET AL. *v.* GALLARDO, TREASURER OF PORTO RICO.

ORDONEZ ET AL. *v.* SAME.

INSULAR MOTOR CORPORATION *v.* SAME.

VALDES ET AL. *v.* SAME.

FINLAY, WAYMOUTH & LEE, INC. *v.* SAME.

PORTILLA ET AL. *v.* SAME.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Nos. 211, 212, 213, 214, 215, 216. Argued October 5, 1927.—Decided October 24, 1927.

1. To "maintain" a suit is to uphold, continue on foot and keep from collapse a suit already begun. P. 61.
2. There is no vested right to an injunction against illegal taxes, and bringing a bill does not create one. P. 61.
3. In the Act of March 4, 1927, amending the Act to provide a civil government for Porto Rico, the provision that no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico, applies to suits which were decided in the District Court and Circuit Court of Appeals before the date of the Act and afterwards brought here by certiorari, and makes necessary that the decrees, which dismissed the bills on the merits, be reversed with directions to dismiss for want of jurisdiction. P. 61.
4. A court which has been deprived by statute of jurisdiction over a pending suit to enjoin a tax has no jurisdiction to dispose of money deposited in the registry by the plaintiff to secure the tax except to return it to the depositor. P. 62.

16 F. (2d) 545, reversed.

CERTIORARI, 274 U. S. 732, to review a decision of the Circuit Court of Appeals for the First Circuit, which affirmed decrees of the United States District Court for

Porto Rico dismissing the bills in suits to enjoin collection of taxes. The decision of the court below is reported *sub nom. Porto Rico Tax Appeals,* 16 F. (2d) 545.

Mr. Francis G. Caffey for petitioners in Nos. 211, 212 and 213.

The Act of March 4, 1927, did not affect cases pending at the time of its passage. The language does not apply to suits brought before that date. *Gallardo* v. *Porto Rico Ry.,* 18 F. (2d) 918; *Moon* v. *Durden,* 2 Exch. 22; *Knight* v. *Lee,* [1893] 1 Q. B. 41; *Burbank* v. *Auburn,* 31 Me. 590; *Delta Bag Co.* v. *Kearns,* 160 Ill. App. 93; *Smith* v. *Lyon,* 44 Conn. 175; *Gumpper* v. *Waterbury Trac. Co.,* 68 Conn. 424; *Bruenn* v. *School Dist.,* 101 Wash. 374; *Creditors Co.* v. *Rossi,* 26 Cal. App. 725; *Grasso* v. *Holbrook Co.,* 102 App. Div. 49; *Union Bank* v. *Brown,* 5 Ohio C. D. 94. There is a presumption that a statute does not apply to a case pending at the time of its enactment. *McEwen* v. *Den,* 24 How. 242; *Twenty Per Cent. Cases,* 20 Wall. 179; *Shwab* v. *Doyle,* 258 U. S. 529; *Lewellyn* v. *Frick,* 268 U. S. 238; *United States* v. *St. Louis &c. Ry.,* 270 U. S. 1.

See further, *Dash* v. *VanKleeck,* 7 Johns. 477; *Gould* v. *Hayes,* 19 Ala. 438; *Gerry* v. *Stoneham,* 1 Allen 319; *Dickens* v. *Dickens,* 174 Ala. 305; *Wallace* v. *Oregon S. L. R. R.,* 16 Idaho 103; *Rogers* v. *Greenbush,* 58 Me. 395; *Auditor* v. *Chandler,* 108 Mich. 569; *Trist* v. *Cabezas,* 2 Rob. 780; 18 Abb. Pr. 143; *Bates* v. *Stearns,* 23 Wend. 482; *Merwin* v. *Ballard,* 66 N. C. 398; *Lilly* v. *Purcell,* 78 N. C. 82; *Newson* v. *Greenwood,* 4 Ore. 119; *Fitzpatrick* v. *Boylan,* 57 N. Y. 433.

To justify construing the language of a statute as retroactive in effect, its language must be "imperative," *United States* v. *Heth,* 3 Cr. 413; *Auffm'ordt* v. *Rasin,* 102 U. S. 622; *U. S. Fidelity Co.* v. *Struthers Co.,* 209 U. S. 314; "indispensable," *Reynolds* v. *McArthur,* 2 Pet. 434; "irresistible," *Carroll* v. *Lessee,* 16 How. 281; "neces-

sary," *Harvey* v. *Tyler*, 2 Wall. 347; and "manifest," *Shreveport* v. *Cole*, 129 U. S. 43. See especially, *Twenty Per Cent. Cases*, 20 Wall. 179; *United States* v. *St. Louis &c. Ry.*, 270 U. S. 1; *White* v. *United States*, 270 U. S. 175.

There is nothing in the general situation, or in the apparent purpose, or in the language, to indicate an intention by Congress to apply it to cases brought before the date of its enactment. Nor was anything said in Congress, during the consideration of the bill revealing an expectation that such cases would be swept away. Cong. Rec., 69th Cong., 2d Sess., p. 5052.

The word "maintain" is at least of ambiguous import. As applied to legal actions it may mean support, hold, continue, commence, institute, or begin. *Boutiller* v. *Milwaukee*, 8 Minn. 97; *Smith* v. *Lyon*, 44 Conn. 175; *Nat. M. Co.* v. *Dist. Ct.*, 34 Nev. 67.

If it were now held that the Act of March 4, 1927, destroyed the jurisdiction of the District Court for Porto Rico to entertain the present cases and they were abated or dismissed, so far as concerns the accumulated sums in court the taxpayers would, or might, be wholly remediless, even though the tax statutes were later found to be invalid. If citizens were left without remedy in that way, it would deprive them of due process of law. *De Lima* v. *Bidwell*, 182 U. S. 199. Support of the same view is expressed in *Memphis* v. *United States*, 97 U. S. 293; *Pritchard* v. *Norton*, 106 U. S. 124; *Louisiana* v. *Mayor*, 109 U. S. 285; *Ettor* v. *Tacoma*, 228 U. S. 148; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Truax* v. *Corrigan*, 257 U. S. 312. Avoidance of such a consequence, or the existence even of doubt about it, is an additional reason for construing the statute so as not to interfere with pending cases. *Carey* v. *South Dakota*, 250 U. S. 118; *Lewellyn* v. *Frick*, 268 U. S. 238.

If the Act of March 4, 1927, had been in effect when the suits were commenced, it would not have deprived the

District Court for Porto Rico of power to grant the relief sought.

Mr. Carroll G. Walter for petitioners in Nos. 214, 215 and 216.

The new statute is inapplicable to pending cases. *Gallardo* v. *Porto Rico Ry.*, 18 F. (2d) 918; *Grasso* v. *Holbrook*, 102 App. Div. 49; *Moon* v. *Durden*, 2 Exch. 22; *Knight* v. *Lee*, [1893] 1 Q. B. 41; *Burbank* v. *Auburn*, 31 Me. 590; *Smith* v. *Lyon*, 44 Conn. 175; *Creditors Co.* v. *Rossi*, 26 Cal. App. 725; *United States* v. *St. Louis Ry.*, 270 U. S. 1; *Hertz* v. *Woodman*, 218 U. S. 205; *Fullerton Co.* v. *Nor. Pac. Ry.*, 266 U. S. 435; *U. S. Fidelity Co.* v. *Struthers Co.*, 209 U. S. 306; *Twenty Per Cent. Cases*, 20 Wall. 179. Rev. Stats. § 13.

It certainly does not affect cases already determined in the District Court, or affect the jurisdiction of this Court to review decrees previously made by the Circuit Court of Appeals.

The perfecting of the appeal transfers the case from the trial court to the appellate court. *Keyser* v. *Farr*, 105 U. S. 265; *Morrin* v. *Lawler*, 91 Fed. 693. Consequently, the prosecution of an appeal or writ of certiorari cannot be regarded as the maintenance of a suit in the trial court. Neither appeals nor writs of error ordinarily are regarded as within the purview of statutes affecting "actions" or "suits." 3 C. J. 305, 330. Neither does such a statute prohibit the District Court from giving effect to a judgment or decree of the Circuit Court of Appeals or of this Court. *White* v. *United States*, 270 U. S. 175.

The cases come within the doctrine of *Hill* v. *Wallace*, 259 U. S. 44. If Rev. Stats. § 3224 would not prevent the maintenance of these suits if the taxes involved were imposed by the United States, then the Act of March 4, 1927, does not prevent their maintenance even if construed as applicable to pending cases. To construe the Act as depriving petitioners of the right to relief in

these cases would render it unconstitutional and void, because as so construed the statute would deprive them of all remedy.

A case is said to become moot when subsequent events destroy the actuality of the controversy, and make a decision of the questions presented unnecessary to a determination of the rights of the parties. *United States* v. *Hamburg Co.*, 239 U. S. 466; *Berry* v. *Davis*, 242 U. S. 468; *Pub. Util. Commrs.* v. *Compania Gen.*, 249 U. S. 425. The actuality of the present controversy certainly is not destroyed by the Act of March 4, 1927. Whether or not petitioners must pay the taxes imposed by the tax statute of August 20, 1925, and whether they may be fined and imprisoned and their property seized if they make sales without paying such taxes, is still a live controversy, not in any way affected by the Act of March 4th, and a decision of the questions presented is still necessary to a determination of their rights. Whether or not they are entitled to a return of their money, now in the custody and under the control of the District Court, is far from being a moot or academic question. It presents a controversy of "present actuality."

Mr. William Cattron Rigby, with whom *Mr. George C. Butte*, Attorney General of Porto Rico, was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

These are suits brought in the District Court of the United States for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. On January 7, 1927, the Circuit Court of Appeals affirmed decrees of the District Court dismissing the bills. On March 4, 1927, by c. 503, § 7, of the Act of that year, Congress provided that § 48 of the Act to provide a civil government for Porto Rico should be amended to read as follows: "Sec. 48. That the Supreme and District Courts of Porto Rico and the respective judges thereof may grant writs of habeas

corpus in all cases in which the same are grantable by the judges of the District Courts of the United States, and the District Courts may grant writs of mandamus in all proper cases.

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico." 44 Stats. 1418, 1421.

Writs of certiorari were granted by this Court on May 16, 1927, but argument was ordered on the question whether the cases had not become moot by virtue of that Act.

Apart from a natural inclination to read them more narrowly, there would seem to be no doubt that the words of the statute covered these cases. To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun. And although the Circuit Court of Appeals in *Gallardo* v. *Porto Rico Ry., Light & Power Co.,* 18 F. (2d) 918, 923, with some color of authority has held that the Act does not apply, we cannot accept that view. To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies of preventing the Island from having its revenues held up by injunction; a policy no less applicable to these suits than to those begun at a later day, and a general policy of our law. Rev. Stat. § 3224. So interpreted the Act as little interferes with existing rights of the petitioners as it does with those of future litigants. There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one. *Hallowell* v. *Commons,* 239 U. S. 506, 509. This statute is not like a provision that no action shall be brought upon a contract previously valid, which in substance would take away a vested right if held to govern contracts then in force. It does not even attempt to validate previously unlawful taxes. It simply makes it plain that these cases are not excepted from the well

known general rule against injunctions. It does not leave the taxpayer without power to resist an unlawful tax, whatever the difficulties in the way of resisting it.

The sequence of the clause in the amendment after others giving authority to grant writs of habeas corpus and mandamus shows that it puts a limit to the power of the Court. See *Dodge* v. *Osborn*, 240 U. S. 118, 119. That is a question of construction and common sense. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. Therefore when the District Court required a deposit in the registry of a sum to secure payment of the tax in dispute, the money should be returned as there is no jurisdiction to dispose of it otherwise.

Of course it does not matter that these cases had gone to a higher Court. When the root is cut the branches fall. *McNulty* v. *Batty*, 10 How. 72.

As the bills were dismissed upon the merits (with partial injunctions in *Valdes* v. *Gallardo* and *Finlay, Waymouth & Lee, Inc.* v. *Gallardo*) the decrees should be reversed and the cases sent back with directions to dismiss for want of jurisdiction.

Decrees reversed and bills ordered to be dismissed.

Money deposited in Court for payment of taxes in case of adverse decision to be returned.

GALLARDO *v.* SANTINI FERTILIZER COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR PORTO RICO, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT UNDER THE ACT OF SEPTEMBER 14, 1922.

No. 164. Argued October 5, 1927.—Decided October 24, 1927.

1. In a case transferred here by the Circuit Court of Appeals in which this Court finds that the trial court lacked jurisdiction, direction for dismissal of the suit on that ground is made without determining whether the transfer was erroneous. P. 63.

2. The jurisdiction of the United States District Court for Porto Rico over pending suits to enjoin taxes was destroyed by the Act of March 4, 1927. See *Smallwood* v. *Gallardo, ante,* p. 56. P. 63.

Reversed.

ON transfer from the Circuit Court of Appeals for the First Circuit of a cause appealed from the United States District Court for Porto Rico.

Mr. William Cattron Rigby, with whom *Mr. George C. Butte,* Attorney General of Porto Rico, was on the brief, for appellant.

Mr. Nelson Gammans for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought in the District Court of Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. An injunction was issued by the District Court, on March 31, 1925. On April 7, 1925, an appeal was allowed to the Circuit Court of Appeals for the First Circuit. That Court at first made a decree reversing the decree of the District Court, but later, on December 18, 1926, set that decree aside and transferred the case to this Court, under the Act of September 14, 1922, c. 305; 42 Stat. 837, conceiving that the jurisdiction of the District Court was invoked solely upon the ground that the controversy involved the construction or application of the Constitution of the United States. On March 4, 1927, the Act of Congress was passed that took away the jurisdiction of the District Court in this class of cases, as explained in *Smallwood* v. *Gallardo, ante,* p. 56.

The case has been argued upon the merits and also upon a motion to remand it to the Circuit Court of Appeals on the ground that the appeal properly was taken to that Court. As the only jurisdiction remaining anywhere is to make an order requiring the case to be dismissed for want of jurisdiction we need not discuss these

matters. The decision that no jurisdiction remains comes from this Court, and it is proper that it should carry out its decision without unnecessary circuity by directing it to be enforced.

Decree reversed.
Bill to be dismissed for want of jurisdiction.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* SOUTHWELL, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 41. Argued October 18, 1927.—Decided October 31, 1927.

Assuming that a railroad company could be held liable under the Federal Employers Liability Act for the wilful killing of one of its employees by another, if it resulted from the negligent failure of their superior officer to foresee the danger and prevent it, the charge of such negligence is not borne out by the evidence in this case. P. 65.

191 N. C. 153, reversed.

CERTIORARI, 271 U. S. 654, to a judgment of the Supreme Court of North Carolina sustaining a recovery by the widow and administratrix of a deceased employee from the Railroad in an action based on the Federal Employers Liability Act.

Mr. Thomas W. Davis, with whom *Messrs. J. O. Carr* and *V. E. Phelps* were on the brief, for petitioner.

Mr. J. Bayard Clark, with whom *Messrs. Robert H. Dye, L. Clayton Grant,* and *C. D. Weeks* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action brought against the petitioner by the administratrix and widow of one of the petitioner's em-

ployees, for the death of her husband by a murder which it is alleged that the petitioner "with gross negligence wilfully and wantonly caused, permitted and allowed." In view of the decision in *Davis* v. *Green*, 260 U. S. 349, the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied upon its failure to prevent the death. The Supreme Court of North Carolina upheld a judgment for the plaintiff. 191 N. C. 153. It is admitted that the action is based upon the Federal Employers Liability Act of April 22, 1908, c. 149, § 2; 35 Stat. 65, and the question is whether there was any evidence that the death resulted in whole or in part from the negligence of any officer of the petitioning road, under the law as applied by this Court. *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367, 371.

It would be straining the language of the act somewhat to say in any case that a wilful homicide "resulted" from the failure of some superior officer to foresee the danger and to prevent it. In this case at all events we are of opinion that there was no evidence that warrants such a judgment. It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yard master, knew that Southwell, the man who was killed, on previous occasions had used threatening language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him "Cap, all I want to do is to ask Southwell to lay off of me and let me alone," and that Fonville said that he must not see Southwell, that if he saw him and talked to him it might bring about unpleasant consequences; that Fonvielle left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separate them in case of an altercation, but that before he had

time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time; Dallas was a special policeman and had a right to carry it, and not unnaturally did. The only sinister designs, of which there is any evidence, were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this. See *St. Louis-San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344.

Judgment reversed.

BALTIMORE & OHIO RAILROAD COMPANY *v.* GOODMAN, ADMINISTRATRIX.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 58. Argued October 20, 1927.—Decided October 31, 1927.

1. One who drives upon a railroad track relying upon not having heard a train or any signal and taking no further precaution, does so at his own risk. If he can not otherwise be sure whether a train is dangerously near, the driver must stop and get out of his vehicle before attempting to cross. P. 69.
2. In an action for negligence the question of due care is not left to the jury when resolved by a clear standard of conduct which should be laid down by the courts. P. 70.

10 F. (2d) 58, reversed.

CERTIORARI, 271 U. S. 658, to a judgment of the Circuit Court of Appeals sustaining a recovery for death caused by alleged negligence of the Railroad, in an action by the widow and administratrix of the deceased. The action was removed from an Ohio state court on the ground of diversity of citizenship.

Mr. A. McL. Marshall, with whom *Messrs. Byron B. Harlan, Morison R. Waite,* and *William A. Eggers* were on the brief, for petitioner.

A traveler on a highway passing over a railroad crossing at grade is guilty of contributory negligence barring a recovery if he fails to stop, if the view is obscured. *Chicago &c. Ry.* v. *Bennett,* 181 Fed. 799; *Bradley* v. *Mo. Pac. Ry.,* 228 Fed. 484; *Nor. Pac. Ry.* v. *Tripp,* 220 Fed. 286; *Neininger* v. *Cowan,* 101 Fed. 787; *Dernberger* v. *B. & O. R. R.,* 234 Fed. 405; *New York &c. R. R.* v. *Maidment,* 168 Fed. 21; *Brommer* v. *Penna. R. R.,* 179 Fed. 577; *Payne* v. *Shotwell,* 273 Fed. 806; *Payne* v. *Del. &c. R. R.,* 8 F. (2d) 138.

A traveler on the highway over a railroad crossing at grade who fails to look and see what could have been seen had he looked, is guilty of contributory negligence barring a recovery. *B. & O. R. R.* v. *Fidelity Co.,* 2 F. (2d) 310; *Wabash Ry.* v. *Huelsmann,* 290 Fed. 165; *Atchison &c. Ry.* v. *McNulty,* 285 Fed. 97; 262 U. S. 746; *Trenholm* v. *Sou. Pac. Co.,* 4 F. (2d) 562; *Parramore* v. *Denver &c. Ry.,* 5 F. (2) 912; 269 U. S. 560; *Hickey* v. *Mo. Pac. R. R.,* 8 F. (2d) 128; *Bergman* v. *Nor. Pac. Ry.,* 14 F. (2d) 580; *B. & M. R. R.* v. *Daniel,* 290 Fed. 916; *D. T. & I. R. R.* v. *Rohrs,* 114 Oh. St. 493; *Toledo Term. R. R.* v. *Hughes,* 115 Oh. St. 380.

See also, *Jensen* v. *Chicago &c. Ry.,* 12 F. (2d) 413; *Atlantic City R. R.* v. *Smith,* 12 F. (2d) 658; *Atchison &c. Ry.* v. *Spencer,* 20 F. (2d) 714; *Cleve. &c. R. R.* v. *Lee,* 111 Oh. St. 391; *Penna. R. R.* v. *Morel,* 40 Oh. St. 338.

Mr. Robert N. Brumbaugh, with whom *Mr. I. L. Jacobson* was on the brief, for respondent.

The Circuit Court of Appeals found that the decedent could not see north of the tool shed until the front of his truck was less than twenty feet from the west rail. The

evidence was uncontradicted that the seat in which the decedent, as the driver of the truck, was sitting was six feet back from the front of the machine, and that the overhang of the railroad-engine was two and one-half feet. Therefore, the front of his truck was within eleven and one-half feet from the danger point, before he could first see past the tool shed, behind which was the approaching train. Traveling at five to six miles per hour, he was covering seven to eight feet per second. Therefore, he had only one and one-half seconds interval to guide his conduct. Hearing no signal, no bell, or other warning, he had been led into a trap. The Railway Company seeks to hold him guilty of contributory negligence, as a matter of law, upon what he could or could not do in one and one-half seconds. To merely state the proposition is to answer it. *Flannelly* v. *Del. & Hud. Co.*, 225 U. S. 597; *Beckman* v. *Hines*, 279 Fed. 241; *Wise* v. *Del. &c. R. R.*, 81 N. J. L. 397; *L. E. Ry.* v. *Summers*, 125 Fed. 719; 192 U. S. 607; *Grand Trunk Ry.* v. *Ives*, 144 U. S. 408.

The true meaning of the rule contended for by the petitioner is well expressed by the trial judge thus: "In effect, the contention of the defendant goes to the extent of urging that in no case of a daylight automobile crossing accident, in which a view of the track can be had even though but a short distance from the rails, can there be a recovery." We cannot believe that such is the law in any Circuit of the United States. *D. L. & W. Ry.* v. *Rebman*, 285 Fed. 317; *Smith* v. *N. Y. C. Ry.*, 177 N. Y. 224.

The petitioner is asking this court to fix a standard in law by which a court is enabled to arbitrarily say in every case of a daylight automobile crossing accident in which any view of the track can be had, even though a short distance from the rails, what conduct shall be considered reasonable and prudent on the part of the driver of the automobile under any and all circumstances. There is no such "fixed standard." *Grand Trunk Ry.* v. *Ives*, 144

U. S. 417. See *Continental Imp. Co.* v. *Stead*, 99 U. S. 161. The cases cited by petitioner were decided under their peculiar facts, just as was the case at bar.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the widow and administratrix of Nathan Goodman against the petitioner for causing his death by running him down at a grade crossing. The defence is that Goodman's own negligence caused the death. At the trial, the defendant asked the Court to direct a verdict for it, but the request, and others looking to the same direction, were refused, and the plaintiff got a verdict and a judgment which was affirmed by the Circuit Court of Appeals. 10 F. (2d) 58.

Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than sixty miles an hour. The line was straight, but it is said by the respondent that Goodman 'had no practical view' beyond a section house two hundred and forty-three feet north of the crossing until he was about twenty feet from the first rail, or, as the respondent argues, twelve feet from danger, and that then the engine was still obscured by the section house. He had been driving at the rate of ten or twelve miles an hour, but had cut down his rate to five or six miles at about forty feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that

he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true as said in *Flannelly* v. *Delaware & Hudson Co.*, 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts. See *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415, 417, 419.

Judgment reversed.

FAIRMONT CREAMERY COMPANY *v.* MINNESOTA.

MOTION TO RETAX COSTS.

No. 725, October Term, 1926. Submitted October 17, 1927.—Decided November 21, 1927.

1. A clause imposing costs inserted in a final judgment of this Court by the clerk and approved by the Justice who wrote the opinion disposing of the case, is the act of the Court, not merely of the clerk, and is beyond the power of the Court to recall after expiration of the term. So *held* where no petition for rehearing was made within the 40 days allowed by Rule 30. P. 72.
2. As a party to litigation in this Court, a State is not immune to costs in virtue of its sovereignty. P. 73.
3. A rule as to the awarding and division of costs is within the inherent authority of this Court as to all litigants before it, except the United States. P. 74.

4. Costs may be awarded against States, as litigants before this Court, in criminal as well as civil cases. Rule 29, § 3; cf. Jud. Code § 254. *United States* v. *Gaines*, 131 U. S. Appendix clxix, distinguished. P. 75.

THIS was a motion by the State to retax, i. e., to eliminate, the costs allowed against it in this Court. The allowance was included in a judgment reversing a conviction of the Creamery Company in a state prosecution based on a statute which the Court found unconstitutional. 274 U. S. 1.

Messrs. Clifford L. Hilton, Attorney General of Minnesota, and *Charles E. Phillips,* Assistant Attorney General, for defendant in error, in support of the motion.

Messrs. Eugene J. Hainer, Leonard A. Flansburg, George A. Lee, and *M. S. Hartman* for plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a motion by the State of Minnesota to retax the costs in this Court, which, by the judgment herein have been awarded against it. The Fairmont Creamery Company was charged with an offense under a statute of Minnesota before a justice of the peace, and was convicted. The judgment was affirmed on appeal to the District Court for the county, and this was in turn affirmed by the Supreme Court of the State. 168 Minn. 378, 381. The Creamery Company then sued out a writ of error from this Court, which on April 11, 1927, reversed the judgment, because of the unconstitutionality of the statute under which the conviction had been had. 274 U. S. 1. The following was the judgment:

". . . On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of

the said Supreme Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court."

No application for rehearing was made during the term which ended on June 6, 1927. The mandate was issued, and filed with the Supreme Court of Minnesota in July, 1927. The motion of defendant in error now before us was filed September 30, 1927.

Our Rule 30, effective July 1, 1925, provides that a petition for rehearing may be filed with the Clerk, in term time or in vacation, within forty days after judgment is entered, but not later. It is contended by the plaintiff in error that the motion to retax costs would amend the judgment after the term and must be denied, for the reason that this Court has no further jurisdiction in the matter. *Peck* v. *Sanderson,* 18 How. 42; *Sibbald* v. *United States,* 12 Pet. 488, 491, 492; *Schell* v. *Dodge,* 107 U. S. 629, 630; *Phillips* v. *Negley,* 117 U. S. 665, 674. In answer, it is said that this limitation upon the power of the court does not include mere misprisions of the clerk or clerical errors. *Bank of Kentucky* v. *Wistar,* 3 Pet. 431; *Bank of United States* v. *Moss,* 6 How. 31, 38. In the former case, the failure to include as damages in a judgment 6 per cent. interest when required by a rule of the Court was held to be a clerical error that could be corrected after the term. So it is said that the inclusion of the costs in this case was a mere misprision of the clerk, because merely added by the clerk without any special order of the Court. This is inferred because no reference to costs appears in the published opinion. It is not the proper inference. The provision as to costs appears in the judgment, the form of which was, in accordance with our practice, approved by the Justice who wrote the opinion.

He acted under authority of § 3, Rule 29, providing: "In cases of reversal of any judgment or decree by this court, costs shall be allowed to the plaintiff in error, appellant or petitioner, unless otherwise ordered by the court."

A clause in a final judgment affecting costs has been held to be substantial and not within the court's power to change after the term. *Jourolman* v. *East Tennessee Land Co.*, 85 Fed. 251; *Staude Manufacturing Co.* v. *Labombarde*, 247 Fed. 879. The distinction between cases, in which provisions as to interest or costs may be changed after the term and those in which they can not be, lies in the nature and source of the alleged error. If it is made by the clerk in following or not following a rule of court, or for some other reason, the error may be remedied, but if the action complained of was approved by the court, it is beyond recall. Here the judgment as to costs was the action of the Court. See *St. Louis and San Francisco R. R. Co.* v. *Spiller*, *post*, p. 156.

But we are not content to dispose of the motion on this ground alone, even though it be adequate, for the main question is one of much importance in the every day practice before us and ought to be decided now. The argument for the state is that this is a criminal case; that costs in criminal proceedings are only a creature of statute, and that this court has no power to award them against a state unless legislation of the state has conferred it. This is the rule as to the state court in Minnesota. *State* v. *Buckman*, 95 Minn. 272, 278. At common law the public pays no costs, in England the King does not, and the state here, it is said, stands in the place of the King. So it is insisted that, when the state is brought into this Court as a defendant in error in a criminal proceeding, and the judgment of the Court goes against it, costs can not be awarded against the state because it is a sovereign.

That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute

is undoubtedly true. Chief Justice Marshall, in the case of *United States* v. *Barker,* 2 Wheat. 395, said: "The United States never pay costs." In *Reeside* v. *Walker,* 11 How. 272, at p. 290, this Court said: "The sovereignty of the government not only protects it against suits directly, but against judgments even for cost, when it fails in prosecutions." *The Antelope,* 12 Wheat. 546, 550; *United States* v. *McLemore,* 4 How. 286, 288; *United States* v. *Boyd,* 5 How. 29, 51. See also *Nabb* v. *United States,* 1 Ct. Cl. 173; *Henry* v. *United States,* 15 Ct. Cl. 162. But is the state to be regarded as the sovereign here? This Court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.

For many years, costs have been awarded by this Court against states. Under the judicial article of the Constitution, the original jurisdiction of this Court includes suits to which a state is a party. There have been many boundary and other cases brought here by one state against another in which costs have been awarded against one of them and often against both. Usually they have been divided, but if the case proves to be a "litigious case," so-called, all the costs have been assessed against the defeated party. *State of North Dakota* v. *State of Minnesota,* 263 U. S. 583. *State of Missouri* v. *State of Iowa,* 7 How. 660, 681, shows that this has been the practice since 1849. A rule of this Court as to the awarding and division of costs is, of course, not a statute, but such a rule seems to us to be within the inherent authority of the Court in the orderly administration of justice as between all parties litigant, properly within its jurisdic-

tion, except the sovereign government. This view is supported by the history of Rule No. 37 of this Court in the January Term of 1831, 5 Pet. 724. That shows that, against the dissent of Mr. Justice Baldwin, this Court adopted a rule imposing costs against a defendant for a transcript of record in cases of reversal. The dissent was based on the ground that no costs could be imposed by this Court by rule without specific authority of a statute.

It is insisted that, while in civil cases costs may be awarded against a state as a litigant before this Court, the rule does not apply in criminal cases. As the objection to taxing costs against a state has been because of its sovereign character, and that, as we have said, has no application to a state as a litigant in this Court, there would seem to be no more reason for immunity in a criminal case than in a civil one. But it is pointed out that this distinction has been made by this Court in the case of *United States ex rel. Phillips* v. *Gaines*, 131 U. S., Appendix, clxix. That was a writ of error from this Court on a certificate of division between the Judges of the United States Circuit Court for the Middle District of Tennessee. It was a mandamus case brought to command the comptroller of the state to issue his warrant to the state treasurer for the payment of a bill of costs of an indictment against Phillips, one of the relators. In 1870, Phillips had been indicted in the county of Putnam for the murder of one Ford. Phillips presented his petition to the state court, praying for the removal of the indictment into the Circuit Court of the United States by virtue of three Acts of Congress, the first, of March 3, 1863, c. 81, 12 Stat. 755, 756, § 5, the second, of May 11, 1866, c. 80, 14 Stat. 46, § 3, and the last, of February 5, 1867, c. 27, 14 Stat. 385. Their purpose was to enable any officer of the United States, military or civil, charged with a crime, against the state, for acts done under color of federal

authority, to remove the prosecution into the Circuit Court of the United States for trial by the state prosecuting officers in that court. In 1874, the State of Tennessee, by her attorney, appeared and dismissed the case, agreeing that the costs should be adjudged against the state. The Circuit Court accordingly rendered the judgment for costs. A warrant for the payment of the costs was demanded from the state comptroller and refused. Mr. Justice Strong, in deciding the case, said:

"Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it."

He pointed out that this was the rule in the State of Tennessee, *Mooneys* v. *State,* 2 Yerger, (Tenn.) 578, but referred to an Act of 1813 of that State in which it was provided that in all criminal cases above the grade of petit larceny, where the defendant was acquitted, costs should be paid out of the treasury of the State. There were certain statutory prerequisites before they could be paid by the comptroller. The judgment of this Court turned on the fact that such prerequisites had not been complied with. The language of the court indicated that costs could only be awarded in accordance with the statute of the State of Tennessee. We do not think that the case on its facts is an authority here. There was a peculiar and exceptional situation. The case was a prosecution by the State of Tennessee, and its trial by the state was bodily transferred to the environment of the Circuit Court of the United States. All incidents of a trial of the case in the state court were regarded as following the case in the federal court. The question of costs was, therefore, thought to be governed by the same rule as it would have been in the state court.

Without reconsidering the correctness of that ruling, we think the case here to be different. The costs here incurred are in a litigation brought by writ of error into

this Court to test the validity under the Federal Constitution of a statute of the state. The incidents of the hearing are those which attach to the regular jurisdiction of this Court. We have had our Clerk make an examination of our records reaching back to 1860. There were one hundred twenty-nine cases examined, which do not include the boundary cases between states on the Original docket already referred to. It thus appears that since that date the invariable practice has been when the judgment has been against a state in both civil and criminal cases to adjudge costs against it, under the Rule which is now § 3, Rule 29, of our present Rules. That rule in different forms, and under a different number, has been in force since the February term, 1810. Dewhurst, Rules of Practice in the U. S. Courts (2d ed.) 153. It has been in its present form since the January Term, 1858. See *St. Louis and San Francisco R. R. Co.* v. *Spiller, post,* p. 156. We think that the rule, construed by long practice, justifies us in treating the state just as any other litigant and in imposing costs upon it as such, without regard to the inferences sought to be drawn from *United States ex rel. Phillips* v. *Gaines, supra.*

If specific statutory authority is needed, it is found in § 254 of the Judicial Code, which first appeared in the Act of March 3, 1877, c. 105, 19 Stat. 344, and was reenacted March 3, 1911, c. 231, 36 Stat. 1087, 1160. It provides that there shall be "taxed against the losing party in each and every cause pending in the Supreme Court" the cost of printing the record, except when the judgment is against the United States. This exception of the United States in the section with its emphatic inclusion of every other litigant shows that a state as litigant must pay the costs of printing, if it loses, in every case civil or criminal. These costs constitute a large part of all the costs. The section certainly constitutes *pro tanto* statutory authority to impose costs generally against a state if defeated.

The motion is denied.

GONG LUM ET AL. *v.* RICE ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 29. Submitted October 12, 1927.—Decided November 21, 1927.

A child of Chinese blood, born in, and a citizen of, the United States, is not denied the equal protection of the laws by being classed by the State among the colored races who are assigned to public schools separate from those provided for the whites, when equal facilities for education are afforded to both classes. P. 85.
139 Miss. 760, affirmed.

ERROR to a judgment of the Supreme Court of Mississippi, reversing a judgment awarding the writ of mandamus. The writ was applied for in the interest of Martha Lum, a child of Chinese blood, born in the United States, and was directed to the trustees of a high school district and the State Superintendant of Education, commanding them to cease discriminating against her and to admit her to the privileges of the high school specified, which was assigned to white children exclusively.

Messrs. J. N. Flowers, Earl Brewer, and *Edward C. Brewer* for plaintiff in error.

The white, or Caucasian, race, which makes the laws and construes and enforces them, thinks that in order to protect itself against the infusion of the blood of other races its children must be kept in schools from which other races are excluded. The classification is made for the exclusive benefit of the law-making race. The basic assumption is that if the children of two races associate daily in the school room the two races will at last intermix; that the purity of each is jeopardized by the mingling of the children in the school room; that such association among children means social intercourse and social equality. This danger, the white race, by its laws, seeks to divert from itself. It levies the taxes on all alike to

support a public school system, but in the organization of the system it creates its own exclusive schools for its children, and other schools for the children of all other races to attend together.

If there is danger in the association, it is a danger from which one race is entitled to protection just the same as another. The white race may not legally expose the yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against. The white race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination. *Lehew* v. *Brummell,* 103 Mo. 549; *Strauder* v. *West Virginia,* 100 U. S. 303.

Color may reasonably be used as a basis for classification only in so far as it indicates a particular race. Race may reasonably be used as a basis. "Colored" describes only one race, and that is the negro. *State* v. *Treadway,* 126 La. 52; *Lehew* v. *Brummell, supra; Plessy* v. *Ferguson,* 163 U. S. 537; *Berea College* v. *Kentucky,* 133 Ky. 209; *West Chester R. R.* v. *Miles,* 55 Pa. St. 209; *Tucker* v. *Blease,* 97 S. C. 303.

Messrs. Rush H. Knox, Attorney General of Mississippi, and *E. C. Sharp* for defendants in error.

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a petition for mandamus filed in the state Circuit Court of Mississippi for the First Judicial District of Bolivar County.

Gong Lum is a resident of Mississippi, resides in the Rosedale Consolidated High School District, and is the father of Martha Lum. He is engaged in the mercantile business. Neither he nor she was connected with the consular service or any other service of the government of China, or any other government, at the time of her birth.

She was nine years old when the petition was filed, having been born January 21, 1915, and she sued by her next friend, Chew How, who is a native born citizen of the United States and the State of Mississippi. The petition alleged that she was of good moral character and between the ages of five and twenty-one years, and that, as she was such a citizen and an educable child, it became her father's duty under the law to send her to school; that she desired to attend the Rosedale Consolidated High School; that at the opening of the school she appeared as a pupil, but at the noon recess she was notified by the superintendent that she would not be allowed to return to the school; that an order had been issued by the Board of Trustees, who are made defendants, excluding her from attending the school solely on the ground that she was of Chinese descent and not a member of the white or Caucasian race, and that their order had been made in pursuance to instructions from the State Superintendent of Education of Mississippi, who is also made a defendant.

The petitioners further show that there is no school maintained in the District for the education of children of Chinese descent, and none established in Bolivar County where she could attend.

The Constitution of Mississippi requires that there shall be a county common school fund, made up of poll taxes from the various counties, to be retained in the counties where the same is collected, and a state common school fund to be taken from the general fund in the state treasury, which together shall be sufficient to maintain a common school for a term of four months in each scholastic year, but that any county or separate school district may levy an additional tax to maintain schools for a longer time than a term of four months, and that the said common school fund shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be collected

from the data in the office of the State Superintendent of Education in the manner prescribed by law; that the legislature encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement, by the establishment of a uniform system of free public schools by taxation or otherwise, for all children between the ages of five and twenty-one years, and, as soon as practicable, establish schools of higher grade.

The petition alleged that, in obedience to this mandate of the Constitution, the legislature has provided for the establishment and for the payment of the expenses of the Rosedale Consolidated High School, and that the plaintiff, Gong Lum, the petitioner's father, is a taxpayer and helps to support and maintain the school; that Martha Lum is an educable child, is entitled to attend the school as a pupil, and that this is the only school conducted in the District available for her as a pupil; that the right to attend it is a valuable right; that she is not a member of the colored race nor is she of mixed blood, but that she is pure Chinese; that she is by the action of the Board of Trustees and the State Superintendent discriminated against directly and denied her right to be a member of the Rosedale School; that the school authorities have no discretion under the law as to her admission as a pupil in the school, but that they continue without authority of law to deny her the right to attend it as a pupil. For these reasons the writ of mandamus is prayed for against the defendants commanding them and each of them to desist from discriminating against her on account of her race or ancestry and to give her the same rights and privileges that other educable children between the ages of five and twenty-one are granted in the Rosedale Consolidated High School.

The petition was demurred to by the defendants on the ground, among others, that the bill showed on its face that plaintiff is a member of the Mongolian or yellow race, and

therefore not entitled to attend the schools provided by law in the State of Mississippi for children of the white or Caucasian race.

The trial court overruled the demurrer and ordered that a writ of mandamus issue to the defendants as prayed in the petition.

The defendants then appealed to the Supreme Court of Mississippi, which heard the case. *Rice* v. *Gong Lum,* 139 Miss. 760. In its opinion, it directed its attention to the proper construction of § 207 of the State Constitution of 1890, which provides:

"Separate schools shall be maintained for children of the white and colored races."

The Court held that this provision of the Constitution divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow and black races, on the other, and therefore that Martha Lum of the Mongolian or yellow race could not insist on being classed with the whites under this constitutional division. The Court said:

"The legislature is not compelled to provide separate schools for each of the colored races, and, unless and until it does provide such schools and provide for segregation of the other races, such races are entitled to have the benefit of the colored public schools. Under our statutes a colored public school exists in every county and in some convenient district in which every colored child is entitled to obtain an education. These schools are within the reach of all the children of the state, and the plaintiff does not show by her petition that she applied for admission to such schools. On the contrary the petitioner takes the position that because there are no separate public schools for Mongolians that she is entitled to enter the white public schools in preference to the colored public schools. A consolidated school in this state is simply a common school conducted as other common schools are conducted;

the only distinction being that two or more school districts have been consolidated into one school. Such consolidation is entirely discretionary with the county school board having reference to the condition existing in the particular territory. Where a school district has an unusual amount of territory, with an unusual valuation of property therein, it may levy additional taxes. But the other common schools under similar statutes have the same power.

"If the plaintiff desires, she may attend the colored public schools of her district, or, if she does not so desire, she may go to a private school. The compulsory school law of this state does not require the attendance at a public school, and a parent under the decisions of the Supreme Court of the United States has a right to educate his child in a private school if he so desires. But plaintiff is not entitled to attend a white public school."

As we have seen, the plaintiffs aver that the Rosedale Consolidated High School is the only school conducted in that district available for Martha Lum as a pupil. They also aver that there is no school maintained in the district of Bolivar County for the education of Chinese children and none in the county. How are these averments to be reconciled with the statement of the State Supreme Court that colored schools are maintained in every county by virtue of the Constitution? This seems to be explained, in the language of the State Supreme Court, as follows:

"By statute it is provided that all the territory of each county of the state shall be divided into school districts separately for the white and colored races; that is to say, the whole territory is to be divided into white school districts, and then a new division of the county for colored school districts. In other words, the statutory scheme is to make the districts outside of the separate school districts, districts for the particular race, white or colored, so that the territorial limits of the school districts need

not be the same, but the territory embraced in a school district for the colored race may not be the same territory embraced in the school district for the white race, and *vice versa*, which system of creating the common school districts for the two races, white and colored, does not require schools for each race as such to be maintained in each district, but each child, no matter from what territory, is assigned to some school district, the school buildings being separately located and separately controlled, but each having the same curriculum, and each having the same number of months of school term, if the attendance is maintained for the said statutory period, which school district of the common or public schools has certain privileges, among which is to maintain a public school by local taxation for a longer period of time than the said term of four months under named conditions which apply alike to the common schools for the white and colored races."

We must assume then that there are school districts for colored children in Bolivar County, but that no colored school is within the limits of the Rosedale Consolidated High School District. This is not inconsistent with there being, at a place outside of that district and in a different district, a colored school which the plaintiff Martha Lum, may conveniently attend. If so, she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school. If it were otherwise, the petition should have contained an allegation showing it. Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or Caucasian race. But we do not find the petition to present such a situation.

The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. In *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528, 545, persons of color sued the Board of Education to enjoin it from maintaining a high school for white children without providing a similar school for colored children which had existed and had been discontinued. Mr. Justice Harlan, in delivering the opinion of the Court, said:

"Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws, or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools can not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question,

it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution. *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, 206, 208, 209; *State ex rel. Garnes* v. *McCann,* 21 Oh. St. 198, 210; *People ex rel. King* v. *Gallagher,* 93 N. Y. 438; *People ex rel. Cisco* v. *School Board,* 161 N. Y. 598; *Ward* v. *Flood,* 48 Cal. 36; *Wysinger* v. *Crookshank,* 82 Cal. 588, 590; *Reynolds* v. *Board of Education,* 66 Kans. 672; *McMillan* v. *School Committee,* 107 N. C. 609; *Cory* v. *Carter,* 48 Ind. 327; *Lehew* v. *Brummell,* 103 Mo. 546; *Dameron* v. *Bayless,* 14 Ariz. 180; *State ex rel. Stoutmeyer* v. *Duffy,* 7 Nev. 342, 348, 355; *Bertonneau* v. *Board,* 3 Woods 177, s. c. 3 Fed. Cases, 294, Case No. 1,361; *United States* v. *Buntin,* 10 Fed. 730, 735; *Wong Him* v. *Callahan,* 119 Fed. 381.

In *Plessy* v. *Ferguson,* 163 U. S. 537, 544, 545, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, this Court, speaking of permitted race separation, said:

"The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

The case of *Roberts* v. *City of Boston, supra,* in which Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, announced the opinion of that court upholding the separation of colored and white schools under

a state constitutional injunction of equal protection, the same as the Fourteenth Amendment, was then referred to, and this Court continued:

"Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the Courts," citing many of the cases above named.

Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is

Affirmed.

COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS *v.* COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 42. Argued October 18, 19, 1927.—Decided November 21, 1927.

1. A foreign corporation which has property and does business through agents in the Philippine Islands is subject to the taxing power of the Island government as a quasi sovereign, but the power is limited by the Organic Act. P. 92.
2. The liberty secured by the Organic Act embraces the right to make contracts and accumulate property and do business outside of the Philippine Islands and beyond its jurisdiction without prohibition, regulation, or governmental exaction. P. 92.

3. A merchandising corporation organized and having its headquarters in a foreign country, with property and local agents in the Philippines, can not be taxed by the Philippine government upon the premiums for the insurance of its goods shipped from the Islands, paid abroad upon a marine policy entered into abroad with a foreign insurance company having no license or agent in the Islands, and to be performed abroad. P. 92.
4. This is true whether the imposition be regarded as a penalty or as a tax, and regardless of its amount. The purpose in either case is to discourage insurance in outside companies by regulating the conduct of the insured not within the local jurisdiction. P. 95.
5. Where a foreign corporation doing business in the Philippine Islands insures goods in the Islands against fire, in a foreign insurance company which is licensed to do business there, the premiums paid are subject to taxation by the Philippine government, even though the policy was executed and the payments made in a foreign country where the assured had its headquarters. P. 98.

48 P. I. 35, reversed in part; affirmed in part.

CERTIORARI, 271 U. S. 655, to a judgment of the Supreme Court of the Philippine Islands which affirmed a judgment dismissing an action brought by the present petitioner to recover the money demanded of it by the respondent as taxes on insurance premiums, and which the petitioner paid under protest.

Messrs. W. F. Williamson, B. M. Aikins, and *Barry Mohun* for petitioner, submitted.

Mr. William Cattron Rigby, with whom *Messrs. Delfin Jaranilla,* Attorney General of the Philippine Islands, and *A. R. Stallings* were on the brief, for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The Compañía General de Tabacos de Filipinas, hereafter to be called the Tobacco Company, brought this suit in the Court of First Instance in Manila to recover from the Philippine Collector of Internal Revenue certain sums paid under protest as internal revenue taxes on insurance

premiums which the Tobacco Company during the year 1922, through its head office in Barcelona, Spain, paid to the Guardian Insurance Company of London, England, and to Le Comité des Assurances Maritimes de Paris of Paris, France. These two insurance companies we shall hereafter designate as the London Company and the Paris Company. The case was heard on an agreed statement of facts. The Tobacco Company is a corporation, duly organized under the laws of the Kingdom of Spain, and licensed to do business in the Philippine Islands, maintaining its chief office in the Islands in the city of Manila. During the year 1922 the Tobacco Company purchased and placed in its warehouses in the Philippines, merchandise, and from time to time notified its head office in Barcelona of its value. The Tobacco Company at its head office in Barcelona then insured the merchandise against fire under open and running policies of insurance carried by it with the London Company, and paid premiums of forty-eight hundred and thirty-five and 32/100 pesos. Subsequent to the purchase of the merchandise, the Tobacco Company from time to time shipped it to Europe, and by cable notified its head office in Barcelona of the value of the shipments. The head office thereupon insured with the Paris Company these shipments for and on behalf of the Tobacco Company against marine risks under open and running policies, premiums on which amounted during the year 1922 to 100,050.44 pesos, and the premiums thus paid were charged to the expense of the Tobacco Company at Manila. The London Company is licensed to do insurance business in the Philippine Islands and has an agent there. The Paris Company is not licensed to do business in the Philippines and has no agent there. Losses, if any, on these policies were to be paid to the Tobacco Company by the London Company in London and by the Paris Company in Paris. The insurance effected was secured without the use of any agent, company, corpora-

tion or other representative of the companies doing business in the Philippine Islands. The collector in 1923 assessed and collected from the Tobacco Company a tax of one per cent. upon the premiums paid by it to the London Company of 4832.25 pesos, or 48 32/100 pesos, and on those paid by it to the Paris Company 100,050 44/100 pesos, or 1000 50/100 pesos. These sums were paid under protest in writing. The protests were overruled on the 27th day of July, 1923, and on the 16th of August the plaintiff filed this action for the recovery of the taxes.

The taxes were collected under § 192 of Act No. 2427, as amended by Act No. 2430, of the Statutes of the Philippines. 9 Public Laws 292. That section provides that it shall be unlawful for any person or corporation in the Philippines to procure, receive or forward applications for insurance in, or to issue or to deliver or accept policies of, or for, any company or companies not having been legally authorized to transact business in the Philippine Islands, and that any person or company violating this section shall be guilty of a penal offense and upon conviction shall be punished by a fine of two hundred pesos, or imprisonment for two months, or both in the discretion of the court. The section contains a proviso that insurance may be placed by authority of a certificate of the insurance commissioner to any regularly authorized fire or marine insurance agent of the Islands, subject to revocation at any time, permitting the person named therein to procure policies of insurance on risks located in the Philippine Islands in companies not authorized to transact business in the Philippine Islands. Before the agent named in the certificate shall procure any insurance in such company, it must be shown by affidavit that the person desiring insurance after diligent effort has been unable to procure in any of the companies authorized to do business in the Philippine Islands the amount of insurance necessary.

The agent is to make a yearly report to the Collector of Internal Revenue of all premiums received by the company he represents under the previous authority, and he is to pay to the collector of internal revenue a tax equal to twice the tax imposed by § 79 of Act No. 2339, [*i. e.*, 1% thereof] which tax shall be paid at the same time and be subject to the same penalty for delinquency as the tax imposed by Act No. 2339. 9 Public Laws of Philippine Islands, February 27, 1914, p. 296. It is provided further that the prohibitions of the section shall not prevent an owner of property from applying for and obtaining for himself policies in foreign companies in cases where he does not make use of an agent residing in the Philippine Islands. In such cases it shall be his duty to report to the Insurance Commissioner each case where the insurance has been effected and shall pay a tax of one per centum on premiums paid in the manner required by law of insurance companies, and shall be subject to the same penalties for failure to do so.

The court of first instance sustained the validity of the tax as to each insurance company. The Supreme Court of the Philippines affirmed the judgment. Two judges of the latter court dissented on the ground that the tax violated the rule of uniformity, and was a denial of the equal protection of the law.

The Philippine Organic Act (39 Stat. 545, 546, c. 416, § 3) imposes upon the legislature of the Philippine Islands the same limitation by which the Fourteenth Amendment restrains the States of the Union, to wit, that no law shall be enacted in said Islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws. The question of the validity of the tax on the premiums differs in respect to those paid the two insurance companies.

Coming then to the tax on the premiums paid to the Paris Company, the contract of insurance on which the premium was paid was made at Barcelona, in Spain, the headquarters of the Tobacco Company, between the Tobacco Company and the Paris Company, and any losses arising thereunder were to be paid in Paris. The Paris Company had no communication whatever with anyone in the Philippine Islands. The collection of this tax involves an exaction upon a company of Spain, lawfully doing business in the Philippine Islands, effected by reason of a contract made by that company with a company in Paris on merchandise shipped from the Philippine Islands for delivery in Barcelona. It is an imposition upon a contract not made in the Philippines and having no situs there, and to be measured by money paid as premium in Paris, with the place of payment of loss, if any, in Paris. We are very clear that the contract and the premiums paid under it are not within the jurisdiction of the government of the Philippine Islands. The taxpayer, however, is resident in the Philippine Islands and within the governmental jurisdiction of those Islands. Its property in the Islands and its agents doing business there are within the reach of the government of the Islands. The Company may be compelled to pay what the government in its quasi sovereignty chooses to exact as a matter of power, unless restrained by law. A legal restriction upon the taxing power of the Philippine government over citizens and residents of the Islands is found in the liberty secured by the Organic Act, which embraces the right to make contracts and accumulate property, and do business outside of the Philippine Islands and beyond its jurisdiction, without prohibition, regulation, or governmental exaction.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, a law of Louisiana provided that any person who should do any act in Louisiana to effect for himself or for another,

insurance on property then in that state, in any marine insurance company which had not complied in all respects with the laws of the state, should be subject to a fine of $1,000 for each offense. Allgeyer was sued for violating the statute, because he had mailed a letter in New Orleans to the Atlantic Mutual Insurance Company of New York, advising that company of a shipment of 100 bales of cotton to foreign ports, with bill of lading and an insurance certificate in accordance with the terms of an open marine policy of its issuing. Action was brought to recover for three such violations of the act the sum of $3,000. The answer was that the act was unconstitutional, in that it deprived the defendant of its liberty without due process of law; that the business concerning which the defendants were sought to be made liable and the contracts made in reference to such business were beyond the jurisdiction of the state, because the contract of insurance was made with an insurance company in the State of New York, where the premiums were to be paid and where the losses thereunder, if any, were to be paid. This Court held that citizens of a state had a right to contract outside the state for insurance on their property, a right of which the state legislature could not deprive them, because coming within the "liberty" protected by the Fourteenth Amendment, and that the letter sent to the company was a proper act, which the state legislature had no right to prevent, this even though the property which was the subject of the insurance had been within the state.

On the authority of the *Allgeyer* case, this Court decided *St. Louis Cotton Compress Company* v. *State of Arkansas*, 260 U. S. 346. That was a suit by the State of Arkansas against the Compress Company, a corporation of Missouri, authorized to do business in Arkansas. It was brought to recover 5 per cent. on the gross premiums paid by the Compress Company for insurance upon its property

in Arkansas to companies not authorized to do business in that state. A statute of Arkansas in terms imposed a liability for this 5 per cent. as a tax. The answer alleged, and the proof showed, that the policies were contracted for, delivered and paid in St. Louis, Missouri, where the rates were less than those charged by companies authorized to do business in Arkansas. The plaintiff demurred. The Supreme Court of the State justified the imposition as an occupation tax. This Court said:

"The short question is whether this so-called tax is saved because of the name given to it by statute when it has been decided in *Allgeyer* v. *Louisiana,* 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. . . . Here it is five per cent. upon the premiums—which is three per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. The case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside."

The authority of these cases is controlling in disposing of the one before us. The effect of them is that, as a state is forbidden to deprive a person of his liberty without due process of law, it may not compel any one within its juris-

diction to pay tribute to it for contracts or money paid to secure the benefit of contracts made and to be performed outside of the state.

But it is said that these two cases were really cases of penalties, although in the *Compress Company* case the law called the imposition an occupation tax. We are unable to see any sound distinction between the imposition of a so-called tax and the imposition of a fine in such a case. A so-called tax is just as much an interference with the liberty of contract as is a penalty by fine, where the subject matter giving rise to the imposition is beyond the jurisdiction of the state. Reference was made in the *Compress* case to the fact that that which was imposed was larger than would have been the tax in the state if all parties had been in the state and the contract had been made there, but the decision itself clearly does not depend for its basis upon discrimination as between a tax and a prohibition or the amount of it. This Court said, in comparing the *Allgeyer* case and the *Compress* case:

"In Louisiana the detriment was $1,000. Here it is five per cent. upon the premiums—which is three per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State."

And that is just what this tax is for. Even though it is only equal to the tax upon normal premiums paid in the Philippine Islands, it is imposed for the purpose of discouraging insurance in companies that do not pay tribute to the state because out of its taxing or penalizing jurisdiction. As the language above quoted from the opinion in the *Compress* case shows, the action of Arkansas was invalid, because of its attempt "to regulate" the conduct of the Compress Company in respect of a matter not

within its local jurisdiction. Taxation is regulation just as prohibition is.

It is sought to take this case out of the *Allgeyer* and the *Compress* cases by reference to *Equitable Life Assurance Society* v. *Pennsylvania,* 238 U. S. 143. The Equitable Life Assurance Society of New York did business in Pennsylvania. The Legislature levied an annual tax of 2 per cent. upon the gross premiums of every character received from business done by it within the state during the preceding year. The company paid large taxes, but appealed to the state courts to relieve it from charges for such of the premiums for five years as had been paid outside the state by residents of Pennsylvania. It was contended by the company that such taxation was of property beyond the jurisdiction of the state, relying on the *Allgeyer* case. This Court held that the tax was a tax for the privilege of doing business in Pennsylvania, and that the fact that the state could not prevent the contracts did not interfere with its right to consider the benefit annually extended to the Assurance Society by Pennsylvania in measuring the value of the privileges so extended; that the tax was a tax upon a privilege actually used, and the only question concerned the mode of measuring the tax. This Court said as to that:

"A certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. See *Connecticut Mut. Life Ins. Co.* v. *Spratley,* 172 U. S. 602, 611; *Pennsylvania Lumbermen's Mut. Fire Ins. Co.* v. *Meyer,* 179 U. S. 407, 415. It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us

impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

The case is not in conflict either with the *Allgeyer* case or with the *Compress* case, decided as late as December, 1922. It turns entirely on the fact that the taxpayer had subjected itself to the jurisdiction of Pennsylvania in doing business there, and it was for the state to say what the condition of its doing that business in the matter of the payment of taxes should be. This Court said that the Equitable Society was doing business in Pennsylvania when it was annually paying dividends in Pennsylvania, or sending an adjuster into the state in case of dispute, or making proof of death, and therefore that it was not improper to measure the tax for doing business in the state by the number of individuals whose lives had been insured and with respect to whom, and the execution of whose contracts, the company was necessarily doing business in the state, even if the premiums paid by some of them had not been paid in the state.

It is true that, in considering the question of the measure of the tax, this Court referred to the argument of the Supreme Court of Pennsylvania that the tax might be properly measured by New York contracts because Pennsylvania protected the individuals insured therein during their lives in Pennsylvania. Our Court accepted this as one of several reasons for including such individuals in the measure of the tax, because of the incidental business done by the Insurance Company in Pennsylvania which the living of such individuals in that state, after the making of the contract, brought into its performance and consummation. But such reference can not be made a basis for an argument that such protection as the Government of the Philippine Islands gave to the merchandise while being shipped at Manila furnished any jurisdiction for a tax by that Government on the premiums paid in Barcelona upon the insurance contract.

If that were to be admitted, then neither the *Allgeyer* nor the *Compress* case could be sustained, for the property in each of those cases was protected by the government seeking to impose the forbidden exactions upon the owner, who obtained the insurance out of the state, on that property within it. The tax here is not on the property insured. It is a tax on the contract, or its proceeds, which were not in the Philippines, or expected to be there. The *Equitable Society* case does not control or affect the question we are considering. Unless we are to reverse the *Compress* and *Allgeyer* cases, the judgment of the Supreme Court of the Philippines in respect of the tax on the premiums paid to the Paris Company must be held to be erroneous.

Second. We come now to the question of the tax upon the premiums paid to the London Company, which was licensed and presumably was doing business in the Philippine Islands. Does the fact that, while the Tobacco Company and the London Company were within the jurisdiction of the Philippines, they made a contract outside of the Philippines for the insurance of merchandise in the Philippines, prevent the imposition upon the assured of a tax of one per cent. upon the money paid by it as a premium to the London Company? We may properly assume that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment, and the activities of agents in the Philippine Islands with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143. The case is a close one, but in deference to the conclusion we

reached in the latter case, we affirm the judgment of the court below in respect to the tax upon the premium paid to the London Company.

The judgment of the Supreme Court of the Islands is reversed in part and affirmed in part.

MR. JUSTICE HOLMES, dissenting.

This is a suit to recover the amount of a tax alleged to have been illegally imposed. The plaintiff is a Spanish corporation licensed to do business in the Philippine Islands and having an office in Manila. In 1922 from time to time it bought goods and put them into its Philippine warehouses. It notified its head office in Barcelona, Spain, of the value of the goods and that office thereupon insured them under open policies issued by a company of London. From time to time also the Philippine branch shipped the goods abroad for sale and secured insurance upon the shipments in the same manner, the premiums being charged to it in both cases. By § 192 of the Philippine Insurance Act, No. 2427, as amended by Act No. 2430, where owners of property obtain insurance directly with foreign companies, the owners are required to report each case to the Collector of Internal Revenue and to 'pay the tax of one per centum on premium paid, in the manner required by law of insurance companies.' The defendant Collector collected this tax on the above mentioned premiums from the plaintiff against its protest. The plaintiff bases its suit upon the contentions that the statute is contrary to the Act of Congress of August 29, 1916, c. 416, § 3, (the Jones Act); 39 Stat. 545, 546, 547, as depriving it of its property without due process of law, and also as departing from the requirement in the same section that the rules of taxation shall be uniform. The Supreme Court of the Philippines upheld the tax. A writ of certiorari was granted by this Court. 271 U. S. 655.

The plaintiff's reliance is upon *Allgeyer* v. *Louisiana*, 165 U. S. 578, in which it was held that a fine could not be imposed by the State for sending a notice similar to the present to an insurance company out of the State. But it seems to me that the tax was justified and that this case is distinguished from that of *Allgeyer* and from *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, by the difference between a penalty and a tax. It is true, as indicated in the last cited case, that every exaction of money for an act is a discouragement to the extent of the payment required, but that which in its immediacy is a discouragement may be part of an encouragement when seen in its organic connection with the whole. Taxes are what we pay for civilized society, including the chance to insure. A penalty on the other hand is intended altogether to prevent the thing punished. It readily may be seen that a State may tax things that under the Constitution as interpreted it can not prevent. The constitutional right asserted in *Allgeyer* v. *Louisiana* to earn one's livelihood by any lawful calling certainly is consistent, as we all know, with the calling being taxed.

Sometimes there may be a difficulty in deciding whether an imposition is a tax or a penalty, but generally the intent to prohibit when it exists is plainly expressed. Sometimes even when it is called a tax the requirement is shown to be a penalty by its excess in amount over the tax in similar cases, as in *St. Louis Cotton Compress Co.* v. *Arkansas*. But in the present instance there is no room for doubt. The charge not only is called a tax but is the same in amount as that imposed where the right to impose it is not denied.

The Government has the insured within its jurisdiction. I can see no ground for denying its right to use its power to tax unless it can be shown that it has conferred no benefit of a kind that would justify the tax, as is held with regard to property outside of a State belonging to one within it. *Frick* v. *Pennsylvania*, 268 U. S. 473, 489.

But here an act was done in the Islands that was intended by the plaintiff to be and was an essential step towards the insurance, and, if that is not enough, the Government of the Islands was protecting the property at the very moment in respect of which it levied the tax. Precisely this question was met and disposed of in *Equitable Life Assurance Co.* v. *Pennsylvania,* 238 U. S. 143, 147.

The result of upholding the Government's action is just. When it taxes domestic insurance it reasonably may endeavor not to let the foreign insurance escape. If it does not discriminate against the latter, it naturally does not want to discriminate against its own.

The suggestion that the rule of taxation is not uniform may be disposed of in a few words. The uniformity required is uniformity in substance, not in form. The insurance is taxed uniformly, and although in the case of domestic insurance the tax is laid upon the Company whereas here it is laid upon the insured, it must be presumed that in the former case the Company passes the tax on to the insured as an element in the premium charged.

For these reasons Mr. Justice BRANDEIS and I are of the opinion that the judgment of the Supreme Court of the Islands should be affirmed.

WICKWIRE, INDIVIDUALLY AND AS EXECUTRIX, *v.* REINECKE, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 149. Submitted October 3, 1927.—Decided November 21, 1927.

1. A decision of the Commissioner of Internal Revenue that property of a decedent was transferred by him in contemplation of death, within the meaning of § 402–c, Revenue Act of 1918, (estate tax), is not conclusive, but the burden of proving it incorrect is on the party suing the collector to recover taxes based upon it. P. 105.

2. Evidence, on this question, *held* sufficient to go to the jury. P. 104.
3. The right to a jury in a suit to recover taxes from a collector is not based on the Seventh Amendment, but arises by implication from § 3226, Rev. Stats., allowing a suit "at law." P. 105.

14 F. (2d) 956, reversed.

CERTIORARI, 273 U. S. 687, to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court dismissing a suit brought to recover from the Collector money demanded, and paid under protest, as an estate tax.

Mr. Forest D. Siefkin for petitioner.

Solicitor General Mitchell, Assistant Attorney General Willebrandt, and *Mr. Sewall Key,* Attorney in the Department of Justice, for respondent, were unable to support the reasoning of the Circuit Court of Appeals, but felt constrained to present the case fully in deference to the views of that court.

Mr. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a suit by Jessie L. Wickwire, individually and as executrix of her husband, Edward L. Wickwire, to recover taxes from the United States Collector of Internal Revenue for the first district of Illinois, on the ground that they were assessed against her and collected without legal authority. The tax was a so-called estate tax assessed by the Commissioner of Internal Revenue under § 402(c) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1097). The section and paragraph provided:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with

respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . ."

On December 22, 1919, the decedent, Edward L. Wickwire, transferred to his wife, the petitioner herein, cash and securities to the value of $362,028.48. He died April 21, 1920. The executrix did not include the value of the transferred property as part of the gross estate in her return for federal estate tax purposes. The Commissioner of Internal Revenue claimed and, after the usual administrative hearings, determined that the transfer was made in contemplation of death, and assessed as a tax $18,021.41, which was paid. The declaration of the petitioner set up these facts and alleged that the transfer by her husband to her was not in contemplation of death. The case came on for trial, a jury was impaneled and sworn, counsel for the executrix made his opening statement, called one witness and was examining him when the court interrupted the proceedings to raise on its own motion the point that the finding of the Commissioner of Internal Revenue, unless impeached for fraud, bad faith, or mistaken legal theory, could not be reviewed by the court. Accordingly the attorney for the United States thereupon interposed a motion to dismiss. The petitioner then made certain offers of proof to establish the fact that the transfer was not in contemplation of death,

which was excluded by the court. The case was then dismissed.

The tender of evidence was included in a bill of exceptions, and was, in general, that the deceased was 62 years old at the time of his death; that he had been suffering for eighteen years from diabetes, but that his condition until early in 1920 was as good as, or better than, it had been for ten years before that time; that his death was from uremic poisoning, the result of an attack of influenza suffered while he was in the South after the transfer; that he had long agreed with his wife that half of what he had belonged to her, but that their capital had been tied up so in business in his name that her half could not be given her until the business was reorganized and turned over to a stock company; that his doctor, a specialist in diabetes, assured him that, while his condition was that of a diabetic, he was not actually afflicted with diabetes, though it might recur; that he had no reason to anticipate death in the near future when he made the transfer in December, 1919; that the transfer was in pursuance to a plan long made and not in anticipation of death.

The action of the court below was based on the supposed authority of *Park Falls Lumber Co.* v. *Burlingame*, 1 Fed. (2d) 855, a decision of the Circuit Court of Appeals for the Seventh Circuit. On a writ of error, the latter Court held that the case cited was not in point, and that the lower court was not concluded by the finding of the Commissioner on the question of fact as to whether the transfer was in contemplation of death, and that the question was possibly a judicial one. But the court added: "Notwithstanding this, the case, on the whole record, should be, and is, affirmed." The explanation of this action, as suggested by the Solicitor General, is that, while the Circuit Court of Appeals held that the trial court had

given a wrong reason for its action, its judgment should be affirmed because the opening statement of counsel for the petitioner, together with the evidence introduced by him and that offered by her, but rejected, showed conclusively as a matter of law that the transfer was in contemplation of death.

It is quite clear that, as held by the Circuit Court of Appeals, the ruling of the trial court was erroneous, and that the decision of the Commissioner of Internal Revenue was not conclusive, but only furnished *prima facie* evidence of its correctness. *United States* v. *Rindskopf,* 105 U. S. 418; *Fidelity & Columbia Trust Co.* v. *Lucas,* 7 Fed. (2d) 146. Upon the issue whether the transfer had been made in contemplation of death, the burden of proof was by the terms of the statute on the petitioner, as indeed it would have been without the special provision of the statute, because she was the plaintiff. We have not set forth *in extenso* the evidence which was offered, but it is very clear that there was enough to go to the jury to meet the burden against the petitioner on this main issue, and that the Circuit Court of Appeals was in error in holding otherwise. Indeed we do not understand the Solicitor General to contest this.

It was suggested, in the brief for the United States in resisting the application for certiorari, that the assignment of error made on behalf of the petitioner was inadequate in that it was not based on a reference to the Seventh Amendment to the Constitution requiring a jury trial in a civil case involving more than twenty dollars. This objection has not been renewed in the brief on the merits, doubtless because the right of the petitioner to a jury in such a case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law. It is within the undoubted power

of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial—if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 281, 282, 284; *Nichols* v. *United States*, 7 Wall. 122, 127; *Cheatham* v. *United States*, 92 U. S. 85, 88, 89.

The judgments, both of the Circuit Court of Appeals and of the District Court, are reversed, and the cause is remanded to the District Court for further proceedings.

Reversed.

SEGUROLA ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 195. Argued October 12, 1927.—Decided November 21, 1927.

1. Under the Organic Act of Porto Rico an accused person is entitled to have a copy of the information free of clerk's fees. P. 109.
2. Refusal to furnish the copy free is harmless when the accused, attended by counsel, waived the reading of the information and pleaded not guilty. P. 110.
3. Where evidence of a search and seizure of intoxicating liquor, including the liquor itself, clearly proved defendants guilty of illegal transportation, and was introduced without objection to the search and seizure, refusal to require a police officer on cross-examination to give the name of the person from whom he obtained information leading to the search, and refusal to sustain a motion to suppress the liquor as evidence upon the ground that the search and seizure were illegal, were not prejudicial. P. 111.
4. In a prosecution for transporting intoxicating liquor, the objection that the liquor was obtained by a search and seizure instituted without warrant or probable cause comes too late when raised for the first time after the liquor has been offered in evidence and admitted. P. 111.

16 F. (2d) 563, affirmed.

CERTIORARI, 274 U. S. 729, to a judgment of the Circuit Court of Appeals which affirmed the conviction of the petitioners, in the District Court of the United States for Porto Rico, of the offense of transporting intoxicating liquors in violation of the National Prohibition Act.

Mr. E. B. Wilcox, with whom *Mr. Salvador Mestre* was on the brief, for petitioners.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Messrs. Bethuel M. Webster, Jr.,* and *Ralston R. Irvine,* Special Assistants to the Attorney General, were on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a review of a sentence against the petitioners upon a criminal information, filed in the District Court of the United States for Porto Rico, charging in the first count possession, and in the second count transportation, of intoxicating liquors in violation of the National Prohibition Act. The conviction on the possession count was set aside by the Circuit Court of Appeals, so that only the second count is here involved. Upon arraignment, petitioners waived a reading of the information and pleaded not guilty. Their counsel thereupon requested that they be furnished with a copy of the information free of charge. The request was denied by the court and an exception noted, the trial court stating that the defendants and their counsel were free to examine the information and to make copies themselves, or have the clerk make them on payment of his fee.

At the trial, Alfonso Ceballos, Chief of Police at Carolina, Porto Rico, testified for the prosecution that, having received a confidential telephone message that Segurola was driving a Buick automobile with a load of liquor from

Luquillo to Loiza, he procured one Ismael Colon to drive him in a Ford car out to a point on the road where he awaited the appearance of the Buick machine; that when that car appeared, he tried to intercept it by obstructing the road with the Ford, but Segurola operated his Buick so as to force the Ford aside, by threat of a collision, and went by at high speed; that the officer was in uniform, which Segurola must have observed; that he followed in the Ford into Carolina, where, owing to obstacles encountered by the Buick, he managed to get around in front of it, and when Segurola saw his way blocked by the Ford, he stopped the Buick, put it in reverse, and crashed into an electric wire post; that Ceballos then arrested Segurola, as well as Santiago, who was sitting beside him, and that a search by Ceballos of the rear compartment of the Buick, which was a roadster, disclosed a number of sacks containing bottles of whiskey, brandy, and gin.

In the cross-examination, Ceballos was asked who gave him the information by telephone. Counsel for the Government objected that "they are the secrets of the police force, which should not be stated in a court of justice, and the stating of the source of such information would be against public policy." The objection was sustained and an exception noted. Evidence was given of the alcoholic content of the liquor and the identity of that examined with that seized. When the liquor was offered and received in evidence, it was objected to on the ground that it had not been properly identified, but the objection was overruled and the liquor admitted. Thereafter, counsel for the defendants moved to suppress the liquor, as evidence, on the ground that the search was without a warrant and did not appear to have been made upon probable cause, and, also, for the reason that, upon the issue of prob ble cause, defendants were not permitted to cross-examine the seizing officer as to the person from whom he

received by telephone the information which induced him to go to look for the Buick car. The motion was overruled. No objection was ever made to the evidence of the officers and others that liquor was found in the car and no evidence to dispute these facts was offered by the defense. At the close of the trial the jury found the defendants guilty as charged and the Court sentenced them to pay fines.

The case was carried upon writ of error to the Circuit Court of Appeals for the First Circuit. 16 Fed. (2d) 563. That Court affirmed the judgment, holding that the refusal to furnish a copy of the information without payment of a fee to the clerk was right and, even if erroneous, was, under the circumstances, a harmless error; that the refusal to permit cross-examination of the officer as to his informant in respect to the coming of Segurola and the contents of his car was in accord with approved public policy and that the circumstances constituted probable cause for a legal seizure.

The error assigned to the failure to direct the delivery of a copy of the information rests on the second section of the Organic Act of Porto Rico,—Act of March 2, 1917, c. 145, 39 Stat. 951, U. S. C., Title 48, § 737, in which it is provided that "in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor." The district judge held that this did not mean that the defendant was to have a copy of the information without paying the regular copying fees to the clerk. We think this was an erroneous construction of the statute. It was enacted by Congress to apply in a country where there were two languages, and in which a

criminal procedure, new in some of its aspects, was to be put into effect. It was not strange, therefore, that it was thought necessary *ex industria* to emphasize the means by which the accused could be advised of the charge made against him. These circumstances make the case of *United States* v. *VanDuzee,* 140 U. S. 169, 172, relied on by the Circuit Court of Appeals, inapplicable. The words do not appear in the analogous provisions of the guaranty of the rights of the accused in our Constitution. They should be given some real effect and the opportunity thus conferred to read the charge upon which the accused is brought into court should not be obstructed by the necessity for paying fees for its enjoyment. We think, therefore, that the court was wrong in not directing that a copy be furnished to each defendant. But that is very different from saying that because of the failure of the court to issue this order, the trial which ensued should be held for naught and a new trial had. As a matter of fact, the petitioners, when attended by counsel, waived a reading of the information and pleaded not guilty, which was an indication that they already knew what the information was and that they really suffered no prejudice which would justify a new trial. We agree with the Circuit Court of Appeals in its conclusion that in any view the error was a harmless one.

The questions which have been chiefly argued here are, first, the correctness of the refusal of the court to allow the police officer to be cross-examined as to the name of the person who communicated to him the information that the defendants were engaged in transporting liquor in a Buick car; and, second, the question of the existence of probable cause to justify the seizure of the automobile under the circumstances shown.

We think that these two questions do not arise, and that the judgment should be affirmed, without regard to the proper answer to them. The results of the search

and seizure were shown by the testimony of the chief of police and of the other witnesses without any objection on behalf of the defendants; and thus was disclosed the fact that the defendants had been engaged in transporting a large amount of liquor in the Buick. No motion was made to strike that evidence out, and no evidence was introduced to contradict what was disclosed by the statements of the chief of police and other witnesses upon this point. The only objection made toward the close of the evidence for the Government was that, when it was proposed to introduce the liquor, it had not been properly identified, but there was ample evidence to show that it had. The motion made thereafter to suppress the liquor as evidence, on the ground that there had been an illegal search, did not include a motion to strike out the evidence of the witnesses as to what occurred when the car was stopped. The objection to the seizure was plainly an after thought.

As there was no evidence introduced by the defendants to refute or deny the testimony unobjected to, which clearly showed the illegal transportation of the liquor and sustained the verdict, the admission in evidence of the liquor and the refusal to permit cross-examination of Ceballos worked no prejudice for which a reversal can be granted. Moreover, the principle laid down by this Court in *Adams* v. *New York,* 192 U. S. 585, and recognized as proper in *Weeks* v. *United States,* 232 U. S. 383, 395, and in *Marron* v. *United States, post,* p. 192, applies to render unavailing, under the circumstances of this case, the objection to the use of the liquor as evidence based on the Fourth Amendment. This principle is that, except where there has been no opportunity to present the matter in advance of trial, *Gouled* v. *United States,* 255 U. S. 298, 305; *Amos* v. *United States,* 255 U. S. 313, 316; *Agnello* v. *United States,* 269 U. S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of

the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. In other words, in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the whiskey and other liquor returned to them as their property and as not subject to seizure or use as evidence. To preserve their rights under the Fourth Amendment, they must at least have seasonably objected to the production of the liquor in court. This they did not do, but waited until the liquor had been offered and admitted and then for the first time raised the question of legality of seizure and probable cause as a ground for withdrawing the liquor from consideration of the jury. This was too late.

On behalf of Santiago, the companion of Segurola in the Buick, it is urged that there was no evidence to justify his conviction and that his is a case of poor dog Tray. He accompanied Segurola from Luquillo to Carolina and in the race of cars which occurred on that trip. There were 188 bottles of liquor lying loose in eleven sacks in a box back of the seat under him in the Buick. He could hardly have been unconscious of their presence. The seizing officer said that Santiago was present and saw the liquor as seized. But Santiago testified that he didn't see the liquor and did not know why he and his companion were being taken to the station. In view of the jar of the collision of the Buick with the electric wire post and the exciting race between the cars and the contradicting evidence of the government witnesses, the jury evidently

thought that Santiago protested too much and had destroyed his credibility. We can not say that there was no evidence to sustain their verdict.

The judgment is

Affirmed.

SIMMONS *v.* SWAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 65. Argued October 24, 1927—Decided November 21, 1927.

1. In an action on a contract, objection that a waiver or excuse of legal tender should have been pleaded, is not open on review if not raised below. P. 115.
2. A contract for the sale of property called for a down payment by check, which was made, other payments by notes with some mortgage security and a payment of $2,500 to be made on or before a date specified, which was the last day for performance of the contract, time being declared of the essence. The parties met on that day, at the place specified in the contract, the other papers were signed and ready, and the vendee then tendered the $2,500 in the form of a certificate of deposit on a near-by bank of unquestioned solvency, but the vendor, though some days before he had requested a check in lieu of one of the notes, refused the certificate because he "had not got to take it" and, saying "good night," left the meeting. Owing to the tardiness of defendant in arriving, banks were closed and the vendee could not get legal tender till the next day. The value of the property had risen greatly since the execution of the contract and there was reason to believe that the vendor wished to escape from his bargain. In an action by the vendee for breach of the contract, *held:*

   (1) In such circumstances and in view of the way of modern business, the jury might find it was natural and reasonable for the vendee to suppose that the certificate of deposit would be enough. P. 116.

   (2) If the vendor, without previous notice, demanded strict legal tender, the vendee was entitled, at least, to a reasonable opportunity—i. e., until the next day—to tender it. *Id.*

(3) The jury might also find in the vendor's behavior, refusal to go farther, which would make another tender unnecessary. *Id.*
11 F. (2d) 267, reversed.

CERTIORARI, 273 U. S. 675, to a judgment of the Circuit Court of Appeals which affirmed a judgment on a verdict against the plaintiff, directed by the District Court in an action by Simmons to recover damages from Swan for breach of a contract.

Messrs. William J. Malone and *Percy S. Bryant,* with whom *Mr. Morris S. Falk* was on the brief, for petitioner.

Mr. Charles Fairhurst, with whom *Mr. William A. Davenport* was on the brief, for respondent.

Mr. JUSTICE HOLMES delivered the opinion of the Court.

This is an action brought by the petitioner for breach of a contract. At the trial the judge directed a verdict for the defendant and the judgment was affirmed by the Circuit Court of Appeals. 11 F. (2d) 267. A writ of certiorari was granted by this Court. 273 U. S. 675.

By the contract the defendant agreed to sell to the petitioner, the plaintiff, a pickle factory, its specified equipment, and the good will of the business. For this the plaintiff agreed to pay fifteen thousand dollars, as follows: five hundred dollars on the signing of the agreement, 'check for which is hereby acknowledged'; twenty-five hundred dollars to be paid on or before October 1, 1923; twelve thousand dollars by the plaintiff's note to the defendant's order, carrying interest at six per cent. and payable on demand, to be secured by mortgage on the property conveyed. The defendant was also to convey the pickles then in tanks on the premises for which the plaintiff was to pay the sum of four dollars per thousand

by a note signed by himself, F. C. Gould and Thomas J. Molumphy as joint makers. The time for performance was on or before October 1, 1923, and the place the office of Davenport and Fairhurst, Greenfield, Massachusetts. Time was declared to be of the essence of the contract and in case of the plaintiff's failure to perform any of his agreements, the five hundred dollars paid at the time of signing was to be retained as liquidated damages. The declaration alleged that the plaintiff was ready, willing, and able to perform his part. If in view of the facts any matter of waiver or excuse should have been pleaded, no question of pleading was raised and none is open here.

A short statement of the dominant facts as they might have been found seems to us sufficient to show that the plaintiff had a right to go to the jury. The plaintiff and his party went to the appointed place on the appointed day, but the defendant was not there and his whereabouts was not to be ascertained, until about two o'clock when he telephoned that he was on his way to Greenfield and probably should be there by three. He arrived somewhere about five or later. After some discussions necessary to finish the business, at from six to seven the papers were signed and ready. The plaintiff then offered to the defendant for the twenty-five hundred dollars that he was to pay, a certificate of deposit from the Produce National Bank of South Deerfield—a bank near by and of unquestioned solvency. The defendant thereupon asked his lawyer if he had got to take it; the lawyer intimated that he was not bound to, and the defendant said 'Well, if I haven't got to take it I am not going to take it; and I will simply say good night, gentlemen'; took his hat and coat and walked out. Of course at that hour the banks were closed and the plaintiff could not get legal tender before the next day. In consequence of a frost the price

of pickles had risen greatly, and the judge at the trial said that it was perfectly obvious that the defendant was trying to get out from under his contract. It will be noted that the contract contemplated that the first payment should be by check, and on September 22 the defendant had sent to the plaintiff a letter addressed to the Silver Lane Pickle Company, assumed to be interested, asking for a 'check in full for the pickle stock' for which by the agreement he was to receive a note; the amount as it turned out, being nearly fifteen thousand dollars. In such circumstances and in view of the way in which business is done at the present day, it might be found to have been natural and reasonable to suppose that a certificate of deposit from a well known solvent bank in the neighborhood would be enough. It seems likely that it would have been except for the defendant's desire to escape from his contract. If without previous notice he insisted upon currency that was strictly legal tender instead of what usually passes as money, we think that at least the plaintiff was entitled to a reasonable opportunity to get legal tender notes, and as it was too late to get them that day might have tendered them on the next. But the jury might find also that the defendant's behavior signified a refusal to go farther with the matter and therefore that the plaintiff was not called upon to do anything more. If these were found to be facts, as they might be, the defendant broke his contract and the plaintiff has a right to recover. We have not mentioned some qualifying details insisted upon by the defendant because we have to consider only what the jury might find. The qualifications do not impress us but there are some important contradictions. The defendant will have an opportunity to present them if the case is tried again. See *Servel* v. *Jamieson*, 255 Fed. 892.

Judgment reversed.

Counsel for Parties.

MERCANTILE TRUST COMPANY *v.* WILMOT ROAD DISTRICT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 69. Argued October 26, 1927.—Decided November 21, 1927.

1. A covenant in bonds secured by deed of trust that, in case of default, there shall be paid to the mortgage trustee, out of the proceeds of the mortgaged subject matter, and before the payment of the interest and principal of the bonds, a reasonable compensation to the trustee and to counsel it may find necessary to employ, means that such payments shall be in addition to payment of the bondholders. P. 118.
2. A statute creating a special improvement district, ordering an assessment of benefits and the laying of a tax to pay the cost of the improvement not exceeding the benefits assessed, and authorizing a board, in order to do the work, to borrow money on negotiable bonds and to mortgage the assessments for their repayment, impliedly authorized the payment of reasonable fees to the mortgage trustee and its attorney, in case of foreclosure, out of the fund created by the assessments. So *held* where the fund sufficed to pay these costs and the bonds also. P. 119.

12 (F. (2d) 718, reversed.

CERTIORARI 273 U. S. 676, to a decree of the Circuit Court of Appeals affirming the District Court in its refusal to allow payments for the services of a mortgage trustee and its counsel, in a suit to foreclose a deed of trust mortgage. The mortgage, pursuant to a statute of Arkansas, covered the assessments on lands to be benefited by a highway to be built with the proceeds of the bonds.

Mr. George B. Rose, with whom *Messrs. S. A. Mitchell, D. H. Cantrell, J. F. Loughborough, A. W. Dobyns,* and *A. F. House* were on the briefs, for petitioner.

Mr. Robert E. Wiley for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a petition by the Mercantile Trust Company to be allowed $2,500 for its services in a foreclosure suit as trustee of the mortgage foreclosed and $7,500 paid to its counsel in the cause. The District Court found that the charges were reasonable, but disallowed them on the ground that they were not provided for in the statute creating the Wilmot Road District that made the mortgage. The decree was affirmed by the Circuit Court of Appeals. 12 F. (2d) 718. A writ of certiorari was granted by this Court. 273 U. S. 676.

The petitioner's reasoning convinces us that the charges should be allowed as costs against the defendant. In the bonds secured the District expressly covenants that in case of default there shall be paid to the trustee out of the proceeds of the assessments pledged, 'and before the payment of the interest and principal of said bonds, a reasonable compensation to the Trustee and to such counsel as the Trustee may find it necessary to employ.' This plainly means a payment out of the assessments over and above the payment to the bondholders, if the words are to receive a natural interpretation and are not required by the statute to be read in a different sense.

The Act creating the Road District, approved January 30, 1920, after indicating the highway to be laid out, orders an assessment of benefits, § 6, and the laying of a tax to pay the costs, not exceeding the value of the benefits assessed, §§ 8–10, the collector receiving a commission, § 9, and empowers the board of commissioners of the District 'to make all such contracts in the prosecution of the work as may best subserve the public interest,' § 12. Then by § 13, 'in order to do the work,' the board is authorized to borrow money, to issue negotiable bonds for the sum, and to 'pledge and mortgage all assessments for the repay-

ment thereof.' As said by the petitioner, a trustee obviously is necessary for a mortgage to secure bonds that are expected to go into many hands, and if a foreclosure is required a lawyer must be employed. The statute must be taken to contemplate and authorize these usual incidents of the mortgage that it invites. It cannot have expected the services to be gratuitous, and there is no reason why the cost should not be borne by those who made them requisite. It is said that the assessment is a public fund not to be applied except as its creation provides. A pretty ignoble immunity has been secured at times on that argument, but it should not be allowed to work more injustice than is inevitable. As we have said, the implications of the statute are as the petitioner contends, and the general rule of equity is stated with such force in *Dodge* v. *Tulleys,* 144 U. S. 451, as to suggest a doubt whether a State could deprive the Courts of the United States of their power to impose these costs. We find nothing in the decisions of the Supreme Court of Arkansas that leads us to believe that that Court would read the statute as attempting to prevent the costs being allowed. See *Arkansas Foundry Co.* v. *Stanley,* 150 Ark. 127, 136.

It is to be observed that the fund got by the assessment was not exhausted by the payment of the bonds, so that no question arises on that score. Nor does it seem to us that the District can get immunity from the words of § 20 forbidding the board to use any money arising from the sale of the bonds for any purpose other than therein specified and expressly directed. For without stopping to quibble over the fact that the money in question comes from the assessment rather than from the sale of the bonds, except to note that the section has a different aim, it is enough that, if we are right, the proposed use of the money is expressly authorized, as a necessary incident of the mortgage provided for in § 13. In other places the

statute contemplates payment for necessary services; we cannot believe that it does not contemplate a similar payment here.

Decree reversed.

LEACH & COMPANY, INC. *v.* PEIRSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 78. Argued October 27, 1927.—Decided November 21, 1927.

1. *Semble* that under the Conformity Acts, rules of evidence established by decisions of the highest court of the State apply to an action on contract between private parties in the District Court. P. 127.
2. A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. P. 128.
3. A, having bought bonds of B through B's sales-agent, wrote B that the purchase was made upon the understanding that B would repurchase at the same price at A's request, and that he desired to avail himself of that privilege. *Held* that B was under no duty to answer the letter and that the letter was inadmissible to prove the salesman's authority to make the agreement asserted. P. 128.

16 F. (2d) 86, reversed.

CERTIORARI, 273 U. S. 676, to a judgment of the Circuit Court of Appeals affirming a judgment recovered by Peirson from the petitioner on an alleged agreement to repurchase bonds sold by the latter to the former.

Mr. Francis Rawle, with whom *Mr. Joseph W. Henderson* was on the brief, for petitioner.

The trial court was bound, under the Conformity Acts, by the decisions of the highest court of Pennsylvania on rules of evidence. *Bucher* v. *Cheshire Co.,* 125 U. S. 555; *Nashua Bank* v. *Anglo-Amer. Co.,* 189 U. S. 221; *Amer. Chem. Co.* v. *Hogan,* 213 Fed. 416; *Myers* v. *Moore Co.,*

279 Fed. 233; *Ex parte McNiel,* 13 Wall. 236; *Davis* v. *Gray,* 16 Wall. 203; *Amer. Pub. Co.* v. *Sloan,* 248 Fed. 251; *Franklin Co.* v. *Luray Co.,* 6 F. (2d) 218.

By the uniform decisions of the highest court of Pennsylvania, an unanswered, self-serving letter is not admissible in evidence as proof of the truth of facts set forth in it. *Fraley* v. *Bispham,* 10 Pa. 320; *Holler* v. *Weiner,* 15 Pa. 242; *Dempsey* v. *Dobson,* 174 Pa. 122; *Kann* v. *Bennett,* 223 Pa. 36. All the authorities in all jurisdictions have held the same. *Lutcher Co.* v. *Knight,* 217 U. S. 257; *Packer* v. *United States,* 106 Fed. 906; *Rumble* v. *United States,* 143 Fed. 772; *Woolsey* v. *Haynes,* 165 Fed. 391; *Thrush* v. *Fullhart,* 210 Fed. 1; *Harris* v. *Egger,* 226 Fed. 389; *Morris* v. *Norton,* 75 Fed. 912; *Kumin* v. *Fine,* 229 Mass. 75; *Gray* v. *Kaufman,* 162 N. Y. 388; *Viele* v. *McLean,* 200 N. Y. 260; *Chicago* v. *McKechney,* 205 Ill. 372; *State* v. *Howell,* 61 N. J. L. 142; *Biggs* v. *Stueler,* 93 Md. 100; *Seevers* v. *Coal Co.,* 158 Ia. 574; *Bank* v. *McCabe,* 135 Mich. 479; *Hammond* v. *Beeson,* 112 Mo. 190; *Hill* v. *Pratt,* 29 Vt. 119; *Wiedemann* v. *Walpole,* [1891] 2 Q. B. 534; *Thomas* v. *Jones,* [1920] 2 K. B. 399; [1921] 1 K. B. 22. The rule is as old as the Roman law. *Scriptura . pro scribente nihil probat.* L. 10, D. XXII. 5. *Gaskill* v. *Skene,* 14 Ad. & El. (N. S.) 664; *Allan* v. *Peters,* 4 Phila. 78.

There is a lack of uniformity in the decisions of the various Circuit Courts of Appeals as to whether or not, under the Conformity Acts, the federal courts are, in the trial of a common law case, bound to follow the rules of evidence of the highest court of the State in which the trial is held. *Chicago &c. Ry.* v. *Kendall,* 167 Fed. 62; *du Pont Co.* v. *Tomlinson,* 296 Fed. 634; *West Tenn. Co.* v. *Shaffer Co.,* 299 Fed. 197; *Union Pac. R. R.* v. *Yates,* 79 Fed. 584. *Swift* v. *Tyson,* 16 Pet. 1, held that the federal courts in the trial of a common law case in New York were not bound by § 34 of the Judiciary Act of 1789

to follow the settled decisions of the courts of that State on a question of general commercial law. The case has been frequently followed and affirmed. It must be regarded as settled law. And the re-enactment of the section in the same words, carries with it the interpretation of the section which had been placed upon it before it was re-enacted.

But the scope of § 34 should not be further restricted under the authority of *Swift* v. *Tyson*. Section 34 provides that "the laws of the several states" shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The opinion of Mr. Justice Story holds that "laws" covers only statutes and long established local customs having the force of laws. It can hardly be questioned that this decision would have been a surprise if it had been made fifty years before. In those early days, the only laws known (apart from statutes) were those which formed a part of the common law of the State. If lower federal courts were to be created, the common law of the State in which a trial was held was the only law by which they could be guided. There was no common law of the United States. So obvious was this that when the Judiciary Draft Bill was introduced in the Senate in 1789, it contained no provisions such as are now found in § 34. This section was added during the debate. It seemed unnecessary.

There was a very significant amendment in the section. The words "the statute laws of the several states" were stricken out and the words "the laws of the several states" were substituted. Charles Warren, 37 Harv. Law Rev. 49. In changing "statute law" to "laws" the amendment also struck out the words "their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise." If Ellsworth had intended only that the

statutes of the several States should be rules of decision, he, apparently, would have retained "statute law" and taken out the reference to the "unwritten common law," but by changing "statute law" to "laws" he must have meant to use a more comprehensive word which should cover the unwritten common law of the several States. and therefore he omitted those words.

Even the Federalists had no idea of creating lower federal courts to administer a common law of their own. And the Anti-Federalists were originally strongly opposed to the creation of any federal courts. In fact, the Judiciary Act was a hard-fought compromise betwen the Federalists who would give the federal courts the full jurisdiction authorized in the Constitution and their opponents who were unwilling to create any lower federal courts. And in this compromise, the jurisdiction of the lower federal courts was extended to but little more than admiralty cases and cases of citizenship. A single case of the broad interpretation of the section need be given. *Simsims* v. *Irvine,* 3 Dall. 425.

The decision in *Swift* v. *Tyson, supra,* was, undoubtedly, a movement or trend towards the idea of nationalism, which, as Charles Francis Adams has said, began with Story, then Webster, and then the Nullification Proclamation. In those days, "questions of jurisdiction were questions of power as between the United States and the several states." Today the pendulum is swinging back to state rights, and it is here submitted that it will be wiser to strengthen rather than weaken, as Justice Story did, the command of § 34. See dissenting opinion in *B. & O. R. R.* v. *Baugh,* 149 U. S. 368.

Mr. John A. Brown, with whom *Mr. Henry P. Brown* was on the brief, for respondent.

The petitioner cannot raise in this Court a question of law not raised in the District Court nor in the Circuit

Court of Appeals. *L. & N. R. R.* v. *Parker,* 242 U. S. 13; *Atl. Coast L. R. R.* v. *Mims,* 242 U. S. 532; 3 Cor. Jur. 723, § 619.

No other cases in Pennsylvania support the statement that in Pennsylvania there is a settled rule of law that under no circumstances and for no purposes is a self-serving, unanswered letter admissible in favor of the writer. All that the Pennsylvania cases cited by petitioner decide is that, upon the facts of those cases, the letter offered by the writer was not admissible. See *Hershey* v. *Love,* 278 Pa. 161; *Cosgrove* v. *Himmelrich,* 54 Pa. 203; *Phila. R. R. Co.* v. *Cowell,* 28 Pa. 329.

It is, therefore, not necessary to consider whether there is a diversity of decisions in the different circuit courts on the question whether the Conformity Acts require federal courts in common law trials to follow the rules of evidence of the state courts in which the trial is held, because, (1) in the District Court no attempt was made to show a local rule of evidence binding on that court, and no assignment of error in the Circuit Court of Appeals was taken to the failure to follow the rule of evidence of the local court; and, (2) even if the decisions of Pennsylvania courts had been cited by petitioner in support of a distinctive local rule of evidence, these cases fail to show any such rule.

The certiorari granted in this case should be dismissed as was done in *Layne Bowler Corp.* v. *Western Webb Works,* 261 U. S. 387.

It is well settled that a general exception to a charge is insufficient. There was no error in admitting in evidence the letter of May 9, 1921, nor in holding that petitioner's failure to reply to it, under the facts in the case, was some evidence from which the jury might find ratification of the contract of repurchase made by petitioner's agent.

The cases cited by petitioner may be divided into several groups.

1. Where the letters were written after the contract had been fully performed or the transaction closed, *Fraley* v. *Bispham,* 10 Pa. 320; *Dempsey* v. *Dobson,* 174 Pa. 123; *Kann* v. *Bennett,* 223 Pa. 86; *Packer* v. *United States,* 106 Fed. 906; *Woolsey* v. *Haynes,* 165 Fed. 391; *Thrush* v. *Fullhart,* 210 Fed. 1.

2. Letters containing an argumentative presentation of the writer's case against the other party: *Dempsey* v. *Dobson,* 174 Pa. 122; *Kann* v. *Bennett,* 223 Pa. 36; *Viele* v. *McLean,* 200 N. Y. 260; *Chicago* v. *McKechney,* 205 Ill. 372.

3. Letters whose only purpose was to inform the receiver that if he did not accede to the writer's demands he would be held liable: *Kumin* v. *Fine,* 229 Mass. 75; *State* v. *Howell,* 61 N. J. L. 142; *Biggs* v. *Stueler,* 93 Md. 100; *Seevers* v. *Coal Co.,* 158 Ia. 574; *Bank* v. *McCabe,* 135 Mich. 479; *Marino* v. *Vecchio,* 83 Pa. Sup. Ct. 377; *McNally* v. *Madison Ave. Corp.,* 211 N. Y. 25.

When a letter is written in the course of the performance of a contract, to enable the writer to avail himself of some right under the contract, or to give some notice that may be necessary to establish his claim in court, or meet some defense raised against his claim, such letter is admissible for the writer if its terms do not go beyond the demand or notice with the explanation necessary to render it intelligible. The effect of this notice or demand will depend on the substantive law applicable to the facts of the case and the situation of the parties. It is submitted that the letter at bar was not purely self-serving. At the time it was written there was no breach, nor even a controversy between the parties; it was written to secure performance of the contract; there is nothing in it to suggest that it was written by the respondent with a view

of making evidence for himself, nor was there anything to indicate that it was used at the trial to enable the respondent to have the benefit of his statement out of court, of the contract made with the agent. There had been sufficient proof of the making of the agreement.

Without any loss to itself, petitioner could have retaken the bonds at the purchase price. By its silence on this subject and making the respondent the loan on the bonds, petitioner deferred meeting the issue as to whether the agent had authority to make the agreement. If respondent had failed to prove that petitioner had notice of its agent's agreement until after the bonds had depreciated in value, petitioner could have set up by way of defense that it was not bound to allow a rescission of the sale on such terms as would impose a loss on it. Therefore, it became necessary for respondent to show notice of the agent's agreement and the terms of such notice.

The duty of petitioner on receiving the letter was then determined by the law of agency. Its silence was some evidence of ratification. *Gold Min. Co.* v. *Nat. Bank,* 96 U. S. 640; *Phila. R. R.* v. *Cowell,* 28 Pa. 329; *Morris* v. *Handy,* 3 F. (2d) 97; Williston, Contracts, § 278; Mechem, Agency, vol. 1, § 454; 2 Cor. Jur. 505. When petitioner received the letter, if it did not approve and accept its agent's contract, it was its duty to inform the respondent, and return the consideration and take back the bonds, for this is all the letter called for. Ratification was therefore to be inferred from the failure to restore the consideration. *Sturtevant* v. *Wallack,* 141 Mass. 119; *Morris* v. *Norton,* 75 Fed. 912; *Auringer* v. *Cochrane,* 225 Mass. 273; *Boice Co.* v. *Kelley,* 243 Mass. 327; *Gifford* v. *Gifford,* 224 Mass. 302; Mechem, Agency, vol. 1, § 436; 2 Cor. Jur. 496, § 116.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by Peirson against the petitioner upon an alleged agreement to repurchase, at any time and at

the purchase price, bonds sold by the petitioner to the plaintiff. The petitioner is a bond house doing a large business, and the only evidence of its having made such a contract was the testimony of the plaintiff that Mather, a salesman, made the promise on the petitioner's behalf, coupled with a letter the admissibility of which is the question here. The purchases were on June 19, 1920, September 23, 1920, and February 28, 1921. The plaintiff testified that on May 9, 1921, he wrote to the petitioner that when he made the second purchase "it was agreed by Mr. Mather that at any time I so desired you would take them off my hands at cost 98. I have need of some money and will avail myself of this privilege. When shall I deliver them to you." The officers of the petitioner denied ever having received the letter and denied the authority of Mather to make any such agreement. It may be mentioned further, although it is not relevant to the question here, that Mather denied having made the contracts alleged. The letter was offered in evidence. It was objected to as a self serving document but was admitted subject to exceptions. There was no other evidence of Mather's authority, but the jury were instructed that, if the petitioner received the letter and failed to disaffirm what Peirson said Mather had done, they would be justified in finding that the petitioner acquiesced in the agreement and that Mather had authority to do what Peirson said he did. The plaintiff got a verdict and judgment and the judgment was affirmed by the Circuit Court of Appeals, 16 F. (2d) 86. On a suggestion of conflict between this and other Circuit Courts of Appeal and of failure to conform to the rule of evidence in Pennsylvania, (a failure in no way affected by the fact that the same rule prevails in most Courts of high authority,) as also of a difference among the Courts as to the scope of the Conformity Acts, a writ of certiorari was granted by this Court. 273 U. S. 676.

A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore, a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission. *Fraley* v. *Bispham,* 10 Pa. 320. *Kann* v. *Bennett,* 223 Pa. 36, 47. *Packer* v. *United States,* 106 Fed. 906. *Woolsey* v. *Haynes,* 165 Fed. 391. *Thrush* v. *Fullhart,* 210 Fed. 1, 6. *Harris* v. *Egger,* 226 Fed. 389, 399. *Kumin* v. *Fine,* 229 Mass. 75. *Viele* v. *McLean,* 200 N. Y. 260. *Richards* v. *Gellatly,* L. R. 7, C. P. 127, 131. *Wiedemann* v. *Walpole* [1891] 2 Q. B. 534, 539. *Thomas* v. *Jones,* [1920] 2 K. B. 399; [1921] 1 K. B. 22.

There were no circumstances in this case to take it out of the general rule. The letter might have been admissible as a demand if a binding contract had been proved, but until evidence of Mather's authority was given the demand was immaterial. It is true that, two days after that on which the plaintiff says that he wrote the letter that we have quoted, the petitioner lent to the plaintiff $15,000 on the security of the $20,000 bonds in question with the usual powers of sale and the plaintiff's note. It would be the merest speculation to regard the plaintiff's story as confirmed by this loan. It may as probably have been an independent transaction, and it might be argued at least as plausibly that the plaintiff's note and assent to the severe conditions of a pledge to brokers was inconsistent with the right that he now asserts. No evidence having been given of Mather's authority to make the contract in suit the petitioner was entitled to a verdict. The request that one should be directed should have been granted. A new trial must be awarded.

Judgment reversed.

MILLSAPS COLLEGE *v.* CITY OF JACKSON.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 14. Argued October 13, 1927.—Decided November 21, 1927.

1. This Court has jurisdiction in error to review a judgment of a state court sustaining a tax over the objection that the general taxing act under which it was levied, if applied to the property in question, would impair the obligation of a contract between the owner and the State. P. 132.
2. In determining whether a contract of tax exemption was intended by a state statute, great weight attaches to the decision of the state court. P. 132.
3. State court *sustained* in holding that where a statute exempted from taxation specifically the lands, not to exceed one hundred acres, used as a site and campus for a college, with the buildings thereon, and also the endowment fund contributed to the college, land not in the former category, but which was donated to and held by the college as part of its endowment, was not part of the "endowment fund" and not within the tax exemption. P. 132.

136 Miss. 795, affirmed.

ERROR to a judgment of the Supreme Court of Mississippi, affirming a judgment of the Circuit Court of Hinds County, sustaining a tax on land belonging to the College in a proceeding to vacate the assessment.

Mr. Charles Scott, with whom *Messrs. Robert H. Thompson, W. T. Horton,* and *Frank T. Scott* were on the brief, for plaintiff in error.

Messrs. Garner W. Green and *William H. Watkins,* with whom *Messrs. Marcellus Green, Chalmers Potter, H. Vaughn Watkins,* and *P. H. Eager* were on the brief, for defendant in error

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Millsaps College is an educational institution, not operated for profit. It was incorporated by a special act of the

Mississippi legislature approved February 21, 1890, which contains, among others, the following provisions.

The incorporators and their successors, under the name of Millsaps College, "may accept donations of real and personal property for the benefit of the college hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college.

"Said corporation shall have the power to select any appropriate town, city or other place in this State, at which to establish said college and to purchase grounds, not to exceed one hundred acres, as a building site and campus therefor, and erect thereon such buildings, dormitories, and halls as they may think expedient and proper, to subserve the purposes of their organization, and the best interest of said institution, and they may invite propositions from any city, or town, or individual in this State for such grounds, and may accept donations or grants of land for the site of said institution.

"That the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls, dormitories there erected, and the endowment fund contributed to said college, shall be exempt from all State, county and municipal taxation, so long as the said college shall be kept open and be maintained for the purposes contemplated by this act, and no longer."

Two improved pieces of land on Capitol Street, in the City of Jackson, were donated to the corporation as recited by the deeds of conveyance "in consideration of the aid thereby to be given to the endowment of Millsaps College." They constitute no part of the "building site and campus" and are carried on the productive endowment account at proper valuations. The buildings are rented

and the revenue derived therefrom is used to defray operating expenses of the College and for no other purposes.

The City assessed the lots and buildings for taxation. By the present proceeding the College seeks to vacate the assessment. It asserts exemption of the property by the Act of 1890 and claims that the later general taxing Act, if applied thereto, would impair the obligation of the contract contrary to Section 10, Article I, Federal Constitution.

The Supreme Court of Mississippi said—

"The exemption from taxation granted the college covers two classes of property: First, the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls and dormitories thereon erected, and second, the endowment fund contributed to said college. It is admitted by counsel for the appellant, and the fact is, that the land here in controversy is not included in the first of these classes, consequently the narrow question presented for decision is, Does the exemption include land held by the college as a part of its endowment?

"The endowment of a college is commonly understood as including all property real or personal, given to it for its permanent support. If the term is to be so defined here, then practically all of the land which the corporation can hold "for the benefit of the college" will be exempt, for all of such property must necessarily be one of two classes: First, the campus and grounds on which the college buildings are situated, or second, land the revenue from which is applied to the support of the college; or in other words, land held as a part of its endowment.

"It seems reasonably clear that the term 'endowment fund' is here used in a more restricted sense and was not intended to include land, for the specific grant of an

exemption on land of a certain character negatives by implication an intention to exempt land of a different character."

And the court accordingly concluded that the statutory exemption in respect of real estate was intended to extend only "to the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls and dormitories thereon erected."

The jurisdiction of this Court is questioned. But the validity of the general taxing act of the State, said to be subsequent to the incorporation, was challenged below upon the ground that if construed to subject the lots in question to taxation, it would impair the obligation of the contract; and under § 344, Title 28, U. S. C., the cause is subject to review here.

While in cases like this "we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed, unless it seems to be plainly erroneous." Also, we think, the rule as to the construction of statutes of exemption from taxation should be applied, and where there is room for reasonable doubt as to total or only partial exemption, the latter alone should be recognized. Great weight attaches to the decision of a state court regarding questions of taxation or exemption therefrom under the constitution or laws of its own State. *Jetton* v. *University of the South,* 208 U. S. 489, 499. *Chicago Theological Seminary* v. *Illinois,* 188 U. S. 662, 674.

Applying the doctrine approved by the cases cited, we accept the interpretation placed upon the Act of incorporation by the Supreme Court of the State and affirm the challenged judgment.

Affirmed.

GULF, COLORADO & SANTA FE RAILWAY COMPANY *v.* MOSER, ADMINISTRATRIX.

CERTIORARI TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

No. 53. Submitted October 19, 1927.—Decided November 21, 1927.

1. In computing the damages recoverable under the Federal Employers' Liability Act by a dependant who has been deprived of future benefits through the death of a railroad employee, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only. P. 136.
2. This interpretation, heretofore approved by this Court, has become an integral part of the statute, and should be followed in the state courts. P. 136.
3. Refusal of a request for an instruction to the jury on the reduction of such future benefits to present value by deduction of interest at the highest rate that the testimony showed could be had on money safely invested and secured,—*held* erroneous. P. 135

277 S. W. 722, reversed.

CERTIORARI, 271 U. S. 655, to a judgment of the Court of Civil Appeals of Texas sustaining a recovery of damages in an action under the Federal Employers' Liability Act. The Supreme Court of Texas refused a writ of error for want of jurisdiction, 277 S. W. 722.

Messrs. Lawrence H. Cake, J. W. Terry, and *Charles K. Lee* for petitioner.

Mr. A. L. Curtis for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Mrs. Moser, administratrix of her husband's estate, brought suit under the Federal Employers' Liability Act

(c. 149, 35 Stat. 65; c. 143, 36 Stat. 291) to recover damages consequent upon his death while employed by petitioner as a brakeman. The point for consideration is whether the trial court charged the jury concerning estimation of damages according to the rule approved by this Court.

The cause went to the jury upon special issues framed as questions. Answers thereto constitute the verdict. Relevant parts of Special Issue No. 7 follow—

"Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the time of his death, if he had continued to live; . . . In assessing the damages, if any, you will confine yourselves solely to the determination of the pecuniary and monetary interest, if any, that the plaintiff and her child had in the continued life of deceased. . . .

"Bearing in mind the foregoing definitions and instructions on the measure of damages, you will answer special issue No. seven.

"What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his

death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence."

Petitioner seasonably objected to the charge as "generally too broad and not definite and specific enough and the jury should be limited in their consideration of the measure of damages, and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider and the way their verdict should be arrived at more fully shown and in line with defendant's requested charges on the issue of damages." Also to Special Issue No. 7 because "it does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss." And it requested the following special instruction.

"In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award, bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case."

This action sufficed to raise the point now presented. Refusal to grant the request was material error.

Chesapeake & Ohio Railway Company v. *Kelly*, 241 U. S. 485, 491, and *Chesapeake & Ohio Railway Company* v. *Gainey*, 241 U. S. 494, announce the applicable rule.

In the first, we distinctly stated that "in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only." The interpretation approved by us has become an integral part of the statute. It should be accepted and followed.

The judgment below is reversed; and the cause will be remanded to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas, for further proceedings not inconsistent with this opinion.

Reversed.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY *v.* WISCONSIN.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Nos. 75, 76. Argued October 27, 1927.—Decided November 21, 1927.

A state tax on domestic insurance companies, called an annual license fee, which consists of three per cent. annually of the gross income of the corporation, save rents from land otherwise taxed and premiums, is void *pro tanto* where the income is in part interest from United States bonds. P. 140.

189 Wis. 103, 114 reversed.

ERROR to the judgments of the Supreme Court of Wisconsin, in two cases, sustaining taxes on the gross income of the Insurance Company. The Company sued in the state circuit court to recover portions of the taxes paid, upon the ground that, *pro tanto*, the tax fell on the income from United States bonds. Judgments of the circuit

court dismissing the complaints on demurrer were affirmed by the court below.

Messrs. Sam T. Swansen and *George Lines* for plaintiff in error.

Mr. Franklin E. Bump, Assistant Attorney General of Wisconsin, with whom *Mr. John W. Reynolds,* Attorney General, was on the brief, for the State of Wisconsin.

The license fee is a privilege or franchise tax, and not a tax on property or income from property. *Northwestern Ins. Co.* v. *State,* 163 Wis. 484; *Northwestern Ins. Co.* v. *Wisconsin,* 247 U. S. 132. It clearly is not intended as a tax on United States bonds or anything else not taxable by the State.

The inducements or considerations for the privilege tax are local, special, privileges clearly within the power of the State to grant or withhold altogether, and, when granted, are clearly within the jurisdiction of the State to tax as such, the tax being lawfully measured by reference to property, business, or income of the corporation which, itself, is beyond the power of the State to tax. *Northwestern Ins. Co.* v. *Wisconsin, supra; Home Ins. Co.* v. *New York,* 134 U. S. 594; *Flint* v. *Stone Co.,* 220 U. S. 107; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *U. S. Grain Corp.* v. *Phillips,* 261 U. S. 106; *Baltic Min. Co.* v. *Mass.,* 231 U. S. 68; *Adams Exp. Co.* v. *Ohio,* 165 U. S. 194; *Cleve. &c. Ry.* v. *Backus,* 154 U. S. 438; *Delaware R. R. Tax Case,* 18 Wall. 206; *Hamilton Co.* v. *Mass.,* 6 Wall. 632; *State Tax on Ry. Receipts,* 15 Wall. 284; *Kansas City R. R.* v. *Botkin,* 240 U. S. 227; *Maine* v. *Gr. Trunk Ry.,* 142 U. S. 217; *Horn Co.* v. *New York,* 143 U. S. 305; *Kan. City &c. R. R.* v. *Stiles,* 242 U. S. 111; *Provident Inst.* v. *Massachusetts,* 6 Wall. 611; *Society for Savings* v. *Coite,* 6 Wall. 594; *Van Allen* v. *Assessors,* 3 Wall. 573; *Securities Bank* v. *District,* 279 Fed. 185.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These two causes, originally brought in the Circuit Court of Dane County, present the same question. The plaintiff company, a corporation under the laws of Wisconsin, has long carried on therein the business of insuring lives. It seeks to recover excess taxes exacted by the State for the five years, 1918–1923. The courts below held that the exaction was proper under § 76.34, Wisconsin Statutes, 1923 (§ 1211–35, Stat. 1919; § 51.32, Stat. 1917). And they definitely denied the contention that so construed and applied the statute conflicted with the Constitution or laws of the United States.

Section 76.34 provides—

"*Life insurance companies to pay annual license.* Every company, corporation or association transacting the business of life insurance within this state, excepting only such fraternal societies as have lodge organizations and insure the lives of their own members, and no others, shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

"(1) *Domestic Companies; Three per cent of Gross Income.* If such company, corporation or association is organized under the laws of this state, three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contracts for annuities.

"(3) *Power Granted by License; License Fee in Lieu of Other Taxes.* Such license, when granted shall author-

ize the company, corporation or association to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company, corporation or association."

In annual reports the Company disclosed all receipts derived from interest on United States bonds and claimed they were exempt from taxation under the Constitution and laws of the United States. The revenue officers acted upon another view, and both courts below have held that they rightly disregarded the source of the receipts and properly assessed sums reckoned upon the Company's entire gross income.

Counsel for the State maintain that the effect of § 76.34 is to impose upon domestic insurance companies a privilege or franchise tax, and not one on property or income; that no charge is laid upon bonds of the United States, but the fee exacted is for granted privileges, including exemption from personal property taxation and right to do business; that the State may require domestic corporations to pay privilege, franchise or license taxes measured by gross income, although partly derived from United States bonds; and that in no proper sense can the challenged tax be regarded as one directly imposed upon gross income.

They also suggest that this Court has interpreted the statute and pointed out its real nature. *Northwestern Mutual Life Ins. Co.* v. *State of Wisconsin*, 247 U. S. 132, 137. Speaking there of this same statute we did declare: "The tax in question is, therefore, not only one for the privilege of doing life insurance business within the State, but is in effect a commutation tax, levied by the State in place of all other taxation upon the personal property of

the company in the State of Wisconsin." But no question was then raised concerning taxation of income derived from United States bonds. The point now presented was not involved.

It cannot be denied (and denial is not attempted) that bonds of the United States are beyond the taxing power of the states. *Home Savings Bank* v. *City of Des Moines,* 205 U. S. 503, 509; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516; and *First National Bank* v. *Anderson,* 269 U. S. 341, 347. Certainly since *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged Act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is *pro tanto* void.

The fundamental question, often presented in cases similar to these, is whether by the true construction of the statute the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation. *Society for Savings* v. *Coite,* 6 Wall. 594; *Home Insurance Co.* v. *New York,* 134 U. S. 594.

Section 76.34 undertakes to impose a charge not measured by dividends paid, as in *Home Insurance Co.* v. *New York,* 134 U. S. 594, nor by net income, as in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; and those cases are not controlling. The distinction between an imposition the amount of which depends upon dividends or net receipts and one measured by gross returns is clear. *U. S. Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, 328, and earlier opinions there cited.

It is important to observe that although a state statute may properly impose a charge which materially affects in-

terstate commerce, without so unreasonably burdening it as to become a regulation within the meaning of the Constitution, no state can lay any charge on bonds of the United States. This distinction was adverted to in *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505, and the principle found application in *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292, and *Indian Territory Ill. Oil Co.* v. *Oklahoma,* 240 U. S. 522. The power to tax property necessary to the conduct of interstate commerce has been often upheld; and without doubt the states by apt enactments may tax the ordinary property, franchises or business of their own corporations.

A taxing act which requires payment of a certain percentage of the gross earnings of an interstate carrier but which practically imposes no more than the ordinary charge upon local property may be sustained. *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335, *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. But if the enactment goes further and burdens property beyond the state, as in *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, or amounts to a direct imposition upon interstate commerce itself, as in *Galveston Ry. Co.* v. *Texas,* 210 U. S. 217, or lays an impost upon exports, as in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, it violates the Federal Constitution.

Here the statute undertook to impose a charge of 3 per cent. upon every dollar of interest received by the Company from United States bonds. So much, in any event, the State took from these very receipts. This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the State.

The judgment below is reversed; and the cause will be remanded to the Supreme Court of the State of Wisconsin for further proceedings not inconsistent with this opinion.

Reversed.

BLODGETT *v.* HOLDEN, COLLECTOR [1]

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 154. Argued October 4, 1927.—Decided November 21, 1927.

1. The Revenue Act of 1924, §§ 319–324, in so far as it undertakes to impose a tax on gifts fully consummated before its provisions taxing gifts came before Congress, is invalid under the Due Process Clause of the Fifth Amendment. *McReynolds, J.; Taft, C. J.,* and *Van Devanter* and *Butler, JJ.,* concurring. P. 147.
2. The provision of the Act in question should be construed, in favor of constitutionality, as meant to operate only from the date of the Act, and only to tax gifts thereafter made. *Holmes, J.; Brandeis, Sanford,* and *Stone, JJ.,* concurring. P. 149.

RESPONSE to questions certified by the Circuit Court of Appeals arising upon review by it of a judgment of the District Court, 11 F. (2d) 180, in favor of the defendant, in a suit to recover money exacted of the plaintiff, Blodgett, by Holden, Collector, as a tax on gifts.

Mr. Mark Norris for Blodgett.

This "gift" tax is an unapportioned "direct" tax and therefore in contravention of Art. I, cl. 3, § 2, and cl. 4, § 9 of the Constitution.

The tax, so far as it affects the plaintiff in this case, has deprived him of property without compensation and without due process of law contrary to the Fifth Amendment. *McCray* v. *United States,* 195 U. S. 27; *Barclay* v. *Edwards,* 267 U. S. 442; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44. Distinguishing, *Stockdale* v. *Ins. Co.,* 20 Wall. 323; *Flint* v. *Stone*

[1] The first of the two opinions is here published as modified by a memorandum decision of Feb. 20, 1928, to be found in the next volume.

Co., 220 U. S. 111; *Brushaber* v. *U. P. R. R.*, 240 U. S. 1; *Patton* v. *Brady*, 184 U. S. 608; *Billings* v. *United States*, 232 U. S. 261; *Schwab* v. *Doyle*, 258 U. S. 529; *Hecht* v. *Malley*, 265 U. S. 144.

See *McNeir* v. *Anderson*, 10 F. (2d) 813; *Anderson* v. *McNeir*, 16 F. (2d) 970; *Brown* v. *Maryland*, 12 Wheat. 444.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Robert P. Reeder*, Special Assistant to the Attorney General, were on the brief, for Holden, Collector.

The tax upon transfers of property by gift is not a direct tax but an excise tax. It is not unconstitutional as applied to transfers of property by gift during the earlier portion of the year in which the law was passed.

It is clearly established that retroactive legislation is not unconstitutional as such. The Constitution forbids Congress to enact *ex post facto* laws and it forbids the States to enact *ex post facto* laws and laws impairing the obligation of contracts, but with these express exceptions neither federal nor state legislation is unconstitutional because it is retroactive. See *Calder* v. *Bull*, 3 Dall. 386; *The Peggy*, 1 Cr. 103; *Prize Cases*, 2 Black. 635; *Johannessen* v. *United States*, 225 U. S. 227; *Satterlee* v. *Matthewson*, 2 Pet. 380; *Curtis* v. *Whitney*, 13 Wall. 68; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140. This Court has sustained state tax laws which were retroactive in scope, *Carpenter* v. *Pennsylvania*, 17 How. 456; *Locke* v. *New Orleans*, 4 Wall. 172; *Seattle* v. *Kelleher*, 195 U. S. 351; *State* v. *Bell*, 61 N. C. 76; and it has sustained similar federal taxes, *Stockdale* v. *Ins. Cos.*, 20 Wall. 323; *Railroad Co.* v. *Rose*, 95 U. S. 78; *Billings* v. *United States*, 232 U. S. 261.

The certificate from the Circuit Court of Appeals states that the gifts under consideration were made between January first and the approval of the law, but it

does not say that they were made before February 26, when the House of Representatives decided that such gifts should be taxed. For all that appears, the gifts were not made more than a day before the law was approved.

The only question which is here necessarily involved is whether Congress may constitutionally tax a transfer by gift made while Congress is enacting the tax law, or even after both Houses of Congress have passed the law and it is awaiting the action of the President. This case is not like that of *Nichols* v. *Coolidge*, 274 U. S. 531.

A tax upon the transfer by gift of state and municipal bonds is not a tax upon those bonds and may be imposed by Congress without unconstitutionally interfering with the operations of the governments issuing them.

Messrs. John W. Davis, Montgomery B. Angell, and *Blount Ralls; Ira Jewell Williams, Nathan Glicksman, Louis Quarles,* and *Ira Jewell Williams, Jr.; C. Alexander Capron* and *Russell L. Bradford; Daniel J. Kenefick* and *Lyman M. Bass; Henry G. Gray* and *George G. Zabriskie;* and *Louis Marshall* filed briefs as *amici curiae,* by special leave of Court.

MR. JUSTICE MCREYNOLDS:

The Circuit Court of Appeals for the Sixth Circuit has certified three questions and asked instructions in respect of them. Title 28, § 346, U. S. C. It is only necessary to answer the one which follows.

"Are the provisions of Secs. 319–324 of the Revenue Act of 1924, c. 234, 43 Stat. 313, unconstitutional insofar as they impose and levy a tax upon transfers of property by gifts *inter vivos,* not made in contemplation of death, and made prior to June 2, 1924, on which date the Act was approved, because the same is a direct tax and unapportioned, or because it takes property without due process,

or for public use without just compensation, in violation of the Fifth Amendment?"

The Revenue Act approved June 2, 1924, provides—

"Sec. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: 1 per centum of the amount of the taxable gifts not in excess of $50,000; etc. . . .

"Sec. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

Section 321 allows certain deductions—$50,000; donations for charitable purposes, etc.

Section 322 is unimportant here.

"Sec. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year. . . .

"Sec. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and

subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301."

Act of February 26, 1926, 44 Stat. 9, 86, c. 27—

"Sec. 324. (a) Section 319 of the Revenue Act of 1924 is amended to read as follows:

"'Sec. 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: 1 per centum of the amount of the taxable gifts not in excess of $50,000; . . .' [Some of the succeeding percentages are less and some are higher than those specified by the Act of 1924.]

"(b) Subdivision (a) of this section shall take effect as of June 2, 1924."

During the calendar year 1924, and prior to June 2, plaintiff Blodgett, a resident of the United States, transferred by gifts *inter vivos*, and not in contemplation of death, property valued at more than $850,000.00; after June 2 he made other gifts valued at $6,500.00. The collector exacted of him the tax prescribed by the Act of 1924, as amended, on such transfers and this suit seeks recovery of the sum so paid. The claim is that the taxing Act, if applicable in the circumstances stated, conflicts with the Fifth Amendment.

At the argument here counsel for Blodgett affirmed that all the transfers prior to June 2 were really made during the month of January; and the accuracy of this statement was not questioned. Under the circumstances, we will treat this affirmation as if it were part of the recital of facts by the court below.

The brief in behalf of the Collector sets out the legislative history of the gift tax provisions in the Revenue Act

of 1924 and shows that they were not presented for the consideration of Congress prior to February 25 of that year. We must, therefore, determine whether Congress had power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it.

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment. As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

Determination of the cause does not require us to consider other objections to the Statute which have been advanced. And it is unnecessary to express an opinion concerning the validity of the Statute as to transfers subsequent to June 2. Here, all such gifts were within the exemption granted.

So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment.

The CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE BUTLER concur in this opinion.

MR. JUSTICE HOLMES:

Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do

so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408. *United States* v. *Standard Brewery*, 251 U. S. 210, 220. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217. *Bratton* v. *Chandler*, 260 U. S. 110, 114. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Words have been strained more than they need to be strained here in order to avoid that doubt. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402. In a different sphere but embodying the same general attitude as to construction, see *United States* v. *Goelet*, 232 U. S. 293, 297.

By § 319 of the Revenue Act of 1924, (June 2, 1924, c. 234; 43 Stat. 253, 313) a tax is laid on gifts 'For the calendar year 1924 and each calendar year thereafter.' In the Code the words are 'during any calendar year.' Title 26, § 1131. The latter phrase brings out what I should think was obvious without its aid, that the purpose is a general one to indicate the periods to be regarded, as distinguished from fiscal years, not necessarily to run counter to the usual understanding that statutes direct themselves to future not to past transactions. *Reynolds* v. *McArthur*, 2 Pet. 417, 434. *Shwab* v. *Doyle*, 258 U. S. 529, 534. *Lewellyn* v. *Frick*, 268 U. S. 238, 251, 252. If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think that we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it in that way now. By § 324 (a) of the Revenue Act of 1926, (February 26, 1926, c. 27; 44 Stat. 9, 86,) § 319 of the Act of 1924 is amended

and the rates of taxation are reduced, and then by (b) it is provided that 'subdivision (a) of this section shall take effect as of June 2, 1924,' the date when the earlier act was passed. A reasonable interpretation is that the reduction and the tax operate alike on gifts after that date. Taking both statutes into account, and the principles of construction to which I have referred, I think it tolerably plain that the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule 'would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways.' *Lewellyn* v. *Frick*, 268 U. S. 232, 251, 252.

On the general question whether there is power to tax gifts I express no opinion now. I agree with the result that the plaintiff is entitled to recover the taxes paid in respect of gifts made before the statute went into effect.

MR. JUSTICE BRANDEIS, MR. JUSTICE SANFORD and MR. JUSTICE STONE concur in this opinion.

UNITED STATES v. BERKENESS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 175. Argued October 11, 1927.—Decided November 21, 1927.

1. The provision of the National Prohibition Act that no warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for some business purpose, supersedes *pro tanto* the Act of February 14, 1917, applicable to Alaska alone. P. 151.
2. A provision in an earlier special act must give way when hostile to a definite policy declared in a later general act. P. 155.

16 F. (2d) 115, affirmed.

CERTIORARI, 274 U. S. 727, to a judgment of the Circuit Court of Appeals affirming a judgment of the District

Court for Alaska in favor of Berkeness, in a suit by the United States under the Alaska liquor law to abate a nuisance alleged to be maintained in his dwelling house.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Mahlon D. Kiefer*, Chief Attorney, Department of Justice, were on the brief, for the United States.

No appearance for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This proceeding was begun by the U. S. Attorney in the District Court for Alaska to enjoin and abate a nuisance said to be maintained in Berkeness' private dwelling at Fairbanks.

The complaint alleges: That on the fifth day of May, 1925, the defendant "had in his possession at and in said premises intoxicating liquor, to wit, beer and wine, and was engaged therein, in manufacturing intoxicating liquor, to wit, beer, which said liquor was kept and stored in said premises and was being manufactured therein by said defendant, in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and particularly in violation of Sections 19 and 20 of said Act.

"That said defendant has for a long time prior to the 5th day of May, 1925, kept and maintained said premises as a common and public nuisance, and has, during said time, kept intoxicating liquor in his possession, and stored in said premises." It was dismissed because unsupported by competent evidence.

A warrant, issued May 5, 1925, by the U. S. Commissioner at Fairbanks, commanded the Marshal to search the premises then occupied by Berkeness as a private dwelling for intoxicating liquors, alleged there to be kept,

possessed and stored by him contrary to the Act of Congress approved February 14, 1917. The preceding affidavits did not charge the use of the dwelling for unlawful *sale* of intoxicants or for any business purpose. The trial court declared the warrant invalid and rejected all evidence obtained thereby. This action met approval by the Circuit Court of Appeals.

An Act of Congress "To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, etc.," approved February 14, 1917, c. 53, 39 Stat. 903, provides—

"That on and after the first day of January, anno Domini nineteen hundred and eighteen, it shall be unlawful for any person, house, association, firm, company, club, or corporation, his, its, or their agents, officers, clerks, or servants, to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the Territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the Territory of Alaska unless the same was procured and is so possessed and transported as hereinafter provided."

"Sec. 13. That it shall be unlawful for any person owning, leasing, or occupying or in possession or control of any premises, building, vehicle, car, or boat to knowingly permit thereon or therein the manufacture, transportation, disposal, or the keeping of intoxicating liquor with intent to manufacture, transport, or dispose of the same in violation of the provisions of this Act."

"Sec. 17. That if one or more persons who are competent witnesses shall charge, on oath or affirmation, before the district attorney or any of his deputies duly authorized to act for him, presenting that any person, company, copartnership, association, club, or corporation has or have violated or is violating the provisions of this Act by manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, ex-

changing for goods, giving away, or otherwise furnishing alcoholic liquor, shall request said district attorney or any of his assistants duly authorized to act for him to cause to be issued a warrant, said attorney or any of his assistants shall cause to be issued such warrant, in which warrant the room, house, building, or other place in which the violation is alleged to have occurred or is occurring shall be specifically described; . . ."

"Manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes" is forbidden by the Eighteenth Amendment.

The National Prohibition Act of October 28, 1919, "To Prohibit Intoxicating Beverages, etc.," c. 85, Title II, 41 Stat. 305, 307, provides—

"Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

"Sec. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. . . ."

"Sec. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or

by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. . . ."

"Sec. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. . . ."

"Sec. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. . . . But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to

prove that such liquor was lawfully acquired, possessed, and used."

"Sec. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. . . ."

Chapter 134, "An Act Supplemental to the National Prohibition Act," approved November 23, 1921, 42 Stat. 222, declares—

"Sec. 3. That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands."

"Sec. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. . . .

"Sec. 6. That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant ma-

liciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment."

The court below held that by the legislation subsequent to the Act of February 14, 1917, Congress imposed "a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States"; and we approve that conclusion.

Notwithstanding known difficulties attending enforcement of prohibition legislation, Congress was careful to declare in the National Prohibition Act that mere possession of liquor in one's home "shall not be unlawful" and to forbid procurement of evidence through warrants directing search of dwellings strictly private not alleged to be used for unlawful sale. The definite intention to protect the home was further emphasized by § 6, Act of 1921.

It is argued that both the Act of 1917 and the later general Act are in full effect within Alaska—one a special act for that Territory, and the other a general law for the United States and all territory subject to their jurisdiction. But the emphatic declaration that no private dwelling shall be searched except under specified circumstances, discloses a general policy to protect the home against intrusion through the use of search warrants. Certainly no adequate reason has been suggested for withholding from those who reside in Alaska the safeguards deemed essential in all other territory subject to the jurisdiction of the United States. The provision of the earlier special Act is hostile to the later declaration of Congress and must give way.

Our conclusion is entirely consistent with established canons of construction, stated and exemplified by *Henderson's Tobacco*, 11 Wall. 652; *State* v. *Stoll*, 17 Wall. 425, 431; *Rodgers* v. *United States*, 185 U. S. 83, 87; *Washington* v. *Miller*, 235 U. S. 422, and similar cases.

Affirmed.

ST LOUIS & SAN FRANCISCO RAILROAD COMPANY ET AL. v. SPILLER ET AL.

MOTION TO AMEND JUDGMENT AND RETAX COSTS.

No. 577, October Term, 1926. Submitted October 3, 1927.—Decided November 21, 1927.

1. Errors in a mandate due to mistake of the clerk may be corrected after expiration of the term at which the judgment was entered. P. 157.
2. The provision of par. 2 of § 16 of the Act to Regulate Commerce, as amended, which exempts the petitioner in a suit to enforce a reparation order from costs in the District Court or "at any subsequent stage" of the proceedings, unless they accrue upon his appeal, is inapplicable to a suit based on a judgment recovered on a reparation order, and brought for the purpose of enforcing an alleged equity or lien against property once belonging to the judgment-debtor carrier, which had been sold on foreclosure. P. 158.
3. Under Rule 29 (3) of this Court, in the absence of specific provision to the contrary, costs are allowed against the defendant in error, appellee or respondent when the judgment or decree below is reversed in part and affirmed in part; and a provision for their payment is properly inserted in the mandate by the clerk. P. 159.

Motion to retax costs denied.

Motion to amend the judgment and retax costs in 274 U. S. 304.

Messrs. E. S. Bailey, Walter H. Saunders, S. H. Cowan, John A. Leahy, and *David A. Murphy* for respondents, in support of the motion.

Messrs. Robert T. Swaine, Edward T. Miller, Frederick H. Wood, and *Alexander P. Stewart* for petitioners, in opposition thereto.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a motion by Spiller to amend the judgment of this Court and retax costs in *St. Louis & San Francisco R. R.* v. *Spiller,* 274 U. S. 304, which was decided on May 16, 1927. The October Term, 1926, closed on June 6. Under Rule 31, the issue of the mandate was necessarily deferred until after the close of the term, as no order shortening the time for issue had been made. It was filed in the office of the clerk of the Circuit Court of Appeals on August 4, 1927. This motion, filed August 22, 1927, was submitted on the first day of this term.

The mandate directed that the petitioners recover $2,219.70 " for their costs herein expended and have execution therefor." The judgment entered by this Court had made no express provision as to costs. It directed merely " that the decree of the said United States Circuit Court of Appeals, in this cause, be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Missouri for further proceedings in conformity with the opinion of this Court." The opinion stated: " The decree of the Circuit Court of Appeals is affirmed in so far as it reversed the decree of the District Court dismissing the intervening petition; and is reversed in so far as it directed that the judgment is a prior lien enforceable for the full amount exclusive of counsel fees against the property of the new company," p. 316.

The relief sought does not involve amendment of the judgment entered. The motion is aimed at the alleged mistake of the Clerk in including the direction for the

payment of costs in the mandate. Clerical errors of that nature, if occurring, may be corrected after expiration of the term at which the judgment was entered. Compare *The Palmyra,* 12 Wheat. 1, 10; *Bank of the Commonwealth of Kentucky* v. *Wistar,* 3 Pet. 431, 432; *Jackson* v. *Ashton,* 10 Pet. 480; *Bank of the United States* v. *Moss,* 6 How. 31, 38; *Alviso* v. *United States,* 6 Wall. 457; *Schell* v. *Dodge,* 107 U. S. 629, 630. There is added reason for allowing correction where the clerical error was made during the vacation of the Court.

Was there such an error here? In other words, was the Clerk's action contrary to an applicable statute, or not in keeping with the rules and practice of the Court? The contention most strongly urged by Spiller is that immunity from costs was conferred by par. 2 of § 16 of the Act to Regulate Commerce as amended. Acts of February 4, 1887, c. 104, 24 Stat. 379, 382, 384; June 29, 1906, c. 3591, § 5, 34 Stat. 584, 590; February 28, 1920, c. 91, § 424, 41 Stat. 456, 474, 491. That paragraph, which deals with suits to enforce reparation orders issued by the Interstate Commerce Commission, provides:

"Such suit in the circuit [district] court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit [district] court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

The argument is that this suit is a "subsequent stage" of the action against the carrier commenced by Spiller in the District Court for western Missouri and prosecuted

there to final judgment. This proceeding arises out of the same cause of action which was the basis for the reparation order and for that action. But it is, in no sense, an "appeal" of the action brought in the Western District. In that action Spiller "finally prevailed" in 1920, when the judgment *in personam* recovered against the carriers in the District Court for western Missouri was reinstated by this Court. *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117. This proceeding is a new and independent one. It is directed at parties other than the carriers against whom the reparation order and that judgment issued. It is a petition based on that judgment, filed in the receivership proceedings pending in the District Court for eastern Missouri, and seeks to enforce an alleged lien or equity against property which once belonged to the carrier and which passed upon foreclosure sale to other parties. If this were, as contended, "a subsequent stage" of the original action, Spiller would have been entitled in this proceeding to an "attorney's fee, to be taxed and collected as a part of the costs." The Circuit Court of Appeals denied recovery in this case even of the attorney's fees forming a part of the judgment recovered in the Western District. That ruling was acquiesced in by Spiller; and, in this respect, the judgment was affirmed by this Court. 274 U. S. 304, 316. The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order. It was not to deny in independent litigation against third persons a customary incident of success. What the Clerk did was not contrary to any provision of the Act to Regulate Commerce.

The question remains whether the Clerk was justified by rule and practice in inserting in the mandate the direction concerning costs. Prior to the January Term, 1831, costs were seldom allowed in this Court upon a

reversal. But see *Turner* v. *Enrille,* 4 Dall. 7, 8; *Wilson* v. *Mason,* 1 Cr. 45, 102; compare Mr. Justice Baldwin, 5 Pet. 724. Rule 37, adopted at that term, made each party chargeable with one-half of the legal fees for a copy of the printed record. 5 Pet. 724. Compare *McKnight* v. *Craig's Adm'r,* 6 Cr. 183, 187; and Rule 22, adopted at the February Term, 1810, 1 Wheat. xvii. Rule 47, adopted at the January Term, 1838, provided that in all cases of reversal, except for want of jurisdiction, costs shall be allowed in this Court to the plaintiff in error or appellant, unless otherwise ordered by the Court. 12 Pet. vii. Rule 24 (3) of the Revised Rules adopted at the December Term, 1858, eliminated the exception concerning reversals for want of jurisdiction. 21 How. xiv. The rule as then revised has remained in force ever since without substantial change. See 108 U. S. 587; 222 U. S. Appendix 29. It is now embodied in Rule 29 (3) of the Revised Rules adopted June 8, 1925. 266 U. S. 675. At no time has the rule expressly prescribed whether costs shall be allowed when the judgment or decree below is reversed only in part. But it has long been the practice of the Clerk to insert in the mandate, in such cases, the provision for payment of costs by the defendant in error, appellee or respondent, in the absence of specific direction by the Court. The acquiescence of the Court in this practice has operated to give effect to it as a practical construction of the rule. We are of opinion that the rule was properly applied in this case. Compare *Baldwin* v. *Ely,* 9 How. 580, 602. Therefore, there has been no clerical error for us to correct.

Motion denied

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* WELLS-DICKEY TRUST COMPANY, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 57. Argued October 20, 1927.—Decided November 21, 1927.

Under the Federal Employers' Liability Act, the cause of action for death of an employee, upon which suit is to be brought by the decedent's personal representative, accrues, (a) to the widow and children if any survive, (b) to the parents, if neither widow nor children survive, or (c) to dependent next of kin, if there be no surviving widow, child or parent; but the liability is to one of the three classes, not to the several classes collectively; and if the person, e. g., the mother, entitled at the death of the employee dies thereafter before a recovery of the compensation, the cause of action dies also, and suit may not be brought on behalf of the class next in line. P. 162.

159 Minn. 417; 166 *Id.* 79, 83, reversed.

CERTIORARI, 271 U. S. 657, to a judgment of the Supreme Court of Minnesota, affirming a recovery of damages in a suit under the Federal Employers' Liability Act, brought by the special administrator of a deceased railroad employee on behalf of his sister, as dependent next of kin.

Mr. J. C. James, with whom *Messrs. J. A. Connell* and *Bruce Scott* were on the brief, for petitioner.

Messrs. F. M. Miner and *Robert J. McDonald* for respondent, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Anderson was killed instantly while employed in interstate commerce by the Chicago, Burlington & Quincy

Railroad. Wells-Dickey Trust Company was appointed special administrator and brought, in a state court of Minnesota, this action under the Federal Employers' Liability Act, April 22, 1908, c. 149, § 1, 35 Stat. 65; United States Code, Title 45, c. 2, § 51, for the benefit of a sister alleged to be dependent. Anderson had not left surviving widow, child, or father. His mother had survived him, but died before the administrator was appointed. No action was brought on her behalf. After proceedings which it is unnecessary to detail, the Railroad moved for a directed verdict, upon the ground that, since the mother had survived, the cause of action vested in her; and that when she died, the cause of action died with her. The direction was denied; the plaintiff got a verdict; and the judgment for the plaintiff entered thereon was affirmed by the highest court of the State. 159 Minn. 417; 166 Minn. 79; 166 Minn. 83. This Court granted a writ of certiorari. 271 U. S. 657.

Whether the action lies, depends upon the construction to be given § 1 of the Federal Employers' Liability Act and presents a novel question. That section provides:

"Every common carrier by railroad . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

For an injury resulting in death the Act gives two distinct causes of action. One is to compensate the injured person for his loss and suffering while he lives. Under the original Act, that cause of action did not survive. *Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59, 67–68. Now, under the amendment added as § 9 by Act of April 5, 1910, c. 143, 36 Stat. 291, it survives to the personal representative. *St. Louis, Iron Mountain*

& Southern Ry. Co. v. *Craft,* 237 U. S. 648. The second cause of action is to compensate persons other than the injured employee for pecuniary loss suffered by them through the employee's death. While the suit thereon must be brought by the personal representative of the employee, he sues as trustee for the person or persons on whose behalf the Act authorizes recovery. The question is whether the sister, being, but for the short survival of the mother, "next of kin, dependent upon such employee" is, under the circumstances, entitled to compensation.

The language of § 1 makes it clear that she is not. The cause of action as there expressed, accrues to the widow and children, if either survives. It accrues to the parents if neither widow nor child survives. It accrues to the next of kin dependent upon the employee, only if there is no surviving widow, child or parent. There are, thus, three classes of possible beneficiaries. But the liability is in the alternative. It is to one of the three; not to the several classes collectively. The contention is that if the one entitled at the death of the employee to the compensation dies thereafter before a recovery, the action may be brought on behalf of the class next in line. There is no basis in the Act for such a shifting of the beneficiary. The statute does not provide for a life interest in one, with remainder over to others in the line of distribution. Nor does it provide for vesting the right to compensation in the one, with a conditional limitation to another, in case the one entitled at the death happens to die thereafter without having secured recovery.

The cause of action accrues at the death. *Reading Co.* v. *Koons,* 271 U. S. 58. When it accrues, there is an immediate, final and absolute vesting; and the vesting is in that one of the several possible beneficiaries who, according to the express provision in the statute, is declared entitled to be compensated. Upon Anderson's death, an administrator might have been appointed and

an action brought immediately. If it had been so brought, it would have been for the benefit solely of the mother; and no other action would have lain. The failure to bring the action in the mother's lifetime did not result in creating a new cause of action after her death for the benefit of the sister.

Reversed.

CITY OF HAMMOND *v.* SCHAPPI BUS LINE, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 67. Argued October 25, 26, 1927.—Decided November 21, 1927.

1. In a suit in the federal courts to enjoin enforcement of a city ordinance, its validity under the Federal Constitution is not properly to be considered if it be found void under the State law; and questions involving the application of that law should be discussed and determined by the two courts below preliminary to their consideration here. P. 169.
2. Before novel and important questions of constitutional law in a suit in the lower federal courts are passed upon by this Court, the facts essential to their decision should be found by those courts upon adequate evidence; this Court will not attempt to find the facts from an inadequate record consisting of pleadings and affidavits used on an application for a temporary injunction. P. 171.
3. When a suit to enjoin enforcement of a city ordinance has gone no farther in the District Court than an order overruling an application for a preliminary injunction based on pleadings and affidavits, and reaches the Circuit Court of Appeals by appeal from that order, it is not ripe for final disposition by a decree of the latter court directing a permanent injunction. P. 172.
4. Under the circumstances, without costs to either party, the decree of the Circuit Court of Appeals directing a permanent injunction is modified by directing an injunction pending the suit, and by remanding the cause to the District Court for proceedings on final hearing with liberty to allow amendment of pleadings. P. 172.

11 F. (2d) 940, modified.

CERTIORARI, 273 U. S. 675, to a decree of the Circuit Court of Appeals rendered on appeal from an order of the

District Court overruling an application for an interlocutory injunction in a suit to restrain the City from enforcing against the petitioner an ordinance concerning the operation of motor busses. The Circuit Court of Appeals reversed the District Court and directed a decree granting the injunction, without specifying its scope. Compare *City of Hammond* v. *Farina Bus Line, post,* p. 173.

Mr. C. B. Tinkham, with whom *Messrs. Louis T. Michener* and *Gerald Gillett* were on the brief, for petitioner.

Mr. William J. Whinery for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit, which was commenced in the federal court for Indiana in July, 1925, is here on certiorari to the Circuit Court of Appeals. 273 U. S. 675. Schappi Bus Line, Incorporated, an Illinois corporation, seeks to enjoin the City of Hammond, Indiana, from enforcing its ordinance No. 1945 concerning the operation of motor busses, adopted May 23, 1925.[1] Section 1 prohibits the operation

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[1] No. 1945.

An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets Within the City of Hammond.

Section 1. Be It Ordained by the Common Council of the City of Hammond, Indiana, that in order to promote public safety and order and to diminish the congestion of vehicular travel within said City, from and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over any of the following parts of streets within said City of Hammond, to-wit:

On Hohman Street from Russell Street to Michigan Avenue;

On State Street from Morton Court to Calumet Avenue;

of any busses (with an exception to be noted) on certain streets which lead into and through the business district. Section 2 prohibits any busses (with the same exception) from stopping anywhere on any street in the City, either

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On Sibley Street from the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley Street westerly to Morton Court;

On Fayette Street from Hohman Street to Oakley Avenue.

Section 2. From and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of receiving or discharging passengers upon any street, alley, or other public place within said City; provided, that the Board of Public Works may, for any period not exceeding six months or successions thereof, permit such operation on any or all of the following designated parts of streets: Columbia Avenue between the South city limits and the right-of-way of the Michigan Central Railroad where the same crosses said Columbia Avenue; Sibley Street from Columbia Avenue to the Easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company; State Line Street from its Southerly terminus to its Northerly terminus at or near the right-of-way of said Michigan Central Railroad aforesaid; Rimbach Avenue from State Line Street to Ann Street; Ann Street from Rimbach Avenue to Russell Street; Russell Street from Ann Street to State Line Street, and for vehicles engaged strictly in interstate commerce any street or other public place North of 122nd Street and East of Calumet Avenue.

Section 3. Whoever violates any of the provisions of Sections 1 and 2 of this Ordinance shall, upon conviction, be fined in any sum not exceeding Fifty ($50.00) Dollars for each and every offense, but nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party under which such motor vehicles are now operated for hire within said City. Nothing herein shall apply to taxicabs.

Section 4. This Ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith.

GEO. J. WOLF,
President.

Attest:
ARNOLD H. KUNERT,
City Clerk.

to load or to discharge passengers, but reserves to the Board of Public Works authority to grant, from time to time, permission, for periods not exceeding six months, to stop on portions of a few designated streets.

For some time prior to the adoption of the ordinance, Schappi, Incorporated, had owned and operated a line of motor busses between Chicago and Hammond; another between Calumet City, Illinois, and Hammond; and one from Calumet City through Hammond to East Chicago, Indiana. The business is chiefly interstate; and on at least one of the lines is wholly interstate. The bill charges that for reasons there set forth the ordinance is void; and alleges that, if enforced, it will compel abandonment of all existing bus lines operated by the plaintiff. The case was heard upon an application for an interlocutory injunction. The District Court denied it without making any finding of fact and without an opinion or other statement of the reasons for its action. The decree was reversed by the Court of Appeals, which remanded the case "with directions to enter a decree granting the injunction," without specifying its scope. 11 F. (2d) 940. That court, also, made no finding on any controverted fact, save that it stated in its opinion "that the record does not show any valid reason for the passage of such an ordinance because of congestion in the streets. The record shows that there was a parking privilege on both sides of the streets in question of not less than an hour's limit, very generally availed of."

The City of Hammond has an area of about 35 square miles; much of it sparsely settled. It has 250 miles of streets. Its population is 60,000. The terminal of the three Schappi lines is on private property in the heart of the business district. Schappi claims that the ordinance not only denies access to its existing terminal, but practically prevents its busses from coming within miles of the business section. The City concedes that the ordi-

nance prohibits the continued operation of Schappi busses over their existing routes. It urges that, despite the prohibition of § 1 of the ordinance, Schappi busses might use other streets which would bring them within a short distance of the business district—and that it might, under § 2, secure permits to stop for loading and unloading which would adequately serve its purposes.

The City asserts that the purpose of the ordinance is to prevent congestion of traffic and to promote safety. Schappi insists that there is no congestion, even in the business district, except such as results, at times, from the passing of railroad trains at grade and from the allowance of unreasonable parking privileges; that the prohibition by § 2 of stopping to load or unload passengers is obviously arbitrary; and that the real purpose of the ordinance is disclosed by § 3 which provides that it shall not "be construed to impair the obligation of any contract to which the City is a party under which motor vehicles are now operated for hire within the City." It appears that, under a contract made by the City in 1924, the Calumet Motor Coach Company is authorized, for a period of twenty-five years, to run its coaches on any street of the City and to stop on any street in order to load or discharge passengers. Schappi asserts that the only purpose of the City in adopting the ordinance was to protect the Calumet Company from the competition of other bus lines. That company has, among other lines, one between Chicago and the business district of Hammond.

The issues of law are as serious and as numerous as those of fact. Schappi contends that the City lacked power to adopt any ordinance dealing with the subject, because by Act of March 4, 1925, Indiana General Assembly, pp. 138–142, and Act of March 14, 1925, Indiana General Assembly, pp. 570–607, the power to authorize use of the highways by motor busses was vested in the

Public Service Commission and Schappi had obtained from it certificates of public convenience and necessity specifically authorizing the use of the existing routes. Schappi contends further that, even if the City possessed the power to deal with the general subject, this ordinance is void, under other state statutes and under the constitution of the State, because it is unreasonable, arbitrary, and grossly discriminatory. And Schappi claims that, regardless of any power which state statutes may have purported to confer upon the City, the ordinance is void under the Commerce Clause, because all of its busses are operated in interstate commerce and the business is chiefly interstate, although some of the busses carry some intrastate passengers. Rights under the Fourteenth Amendment also were asserted.

The opinion of the Court of Appeals states that the ordinance must be sustained, if at all, as a police regulation; that, as such, it was clearly discriminatory; and that it must be held void on that ground. Whether the invalidity results from the provisions of a state statute, or from the constitution of the State, or from the Fourteenth Amendment is not stated. The court did not discuss the statutory powers of the City; declined to consider the effect of the recent state legislation particularly relied upon by the plaintiff; and did not even mention claims urged under the Commerce Clause. If, as Schappi contends, the ordinance is void under the state law, there is no occasion to consider whether it violates the Federal Constitution and there could be no propriety in doing so. Whether it is void under the law of Indiana involves questions upon which this Court should not be called upon to pass without the aid which discussion by members of the lower courts familiar with the local law would afford.

On the other hand, if it should become necessary to consider Schappi's rights under the Commerce Clause, it is

not fitting that these should be passed upon by this Court upon the present record and at this stage of the proceedings. The general principles governing the rights of motor vehicles to use the highways in interstate commerce, *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570; *Buck* v. *Kuykendall*, 267 U. S. 307; *George W. Bush & Sons Co.* v. *Maloy*, 267 U. S. 317; the power of the State to regulate their use, *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corporation* v. *Holyoke Street Ry. Co.*, 273 U. S. 45; *Morris* v. *Duby*, 274 U. S. 135, 143; and its power to require users to contribute to the cost and upkeep, *Hendrick* v. *Maryland*, 235 U. S. 610; *Clark* v. *Poor*, 274 U. S. 554, have been settled by these recent decisions.[2] But the facts here alleged may, if established, require the application of those principles to conditions differing materially from any heretofore passed upon by this Court.

The contentions made in the briefs and arguments suggest, among other questions, the following: Where there is congestion of city streets sufficient to justify some limitation of the number of motor vehicles to be operated thereon as common carriers, or some prohibition of stops to load or unload passengers, may the limitation or prohibition be applied to some vehicles used wholly or partly in interstate commerce while, at the same time, vehicles of like character, including many that are engaged solely in local, or intrastate, commerce are not subjected thereto? Is the right in the premises to which interstate carriers would otherwise be entitled, affected by the fact that, prior to the establishment of the interstate lines,

[2] The protection afforded by the Fourteenth Amendment to motor carriers for hire using the highways exclusively in intrastate commerce was considered in *Packard* v. *Banton*, 264 U. S. 140, and in *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583. See also *Hess* v. *Pawloski*, 274 U. S. 352.

the City had granted to a local carrier, by contract or franchise, the unlimited right to use all the streets of the City, and that elimination of the interstate vehicles would put an end to the congestion experienced? May the City's right to limit the number of vehicles, and to prohibit stops to load or unload passengers, be exercised in such a way as to allocate streets on which motor traffic is more profitable exclusively to the local lines and to allocate streets on which the traffic is less profitable to the lines engaged wholly, or partly, in interstate commerce? Is limitation of the number of vehicles, or prohibition of stops to load or unload passengers, of carriers engaged wholly, or partly, in interstate commerce, justifiable, where the congestion could be obviated by denying to private carriers existing parking privileges or by curtailing those so enjoyed? Are the rights of the interstate carrier in the premises dependent, in any respect, upon the dates of the establishment of its lines, as compared with the dates of the establishment of the lines of the local carrier?

These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of the pleadings and affidavits. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definiteness as to some matters; and present serious conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and of far reaching importance, are passed

upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.

There is an added reason why this Court should not now make the findings of fact or rulings of law involved in these contentions. The Court of Appeals erred in assuming, as its opinion discloses, that the case had been submitted below as upon final hearing; and that the appeal before it was from a final decree dismissing the bill. The appeal was from the interlocutory decree denying the preliminary injunction; and the record discloses no later proceedings in the District Court. The case was not yet ripe for final disposition by the Court of Appeals. Compare *Eagle Glass & Mfg. Co.* v. *Rowe,* 245 U. S. 275, 283. Findings and rulings if now made on the basis of the evidence presented at the hearing on the application for the temporary injunction, might be rendered of no avail by the presentation of other or additional evidence when the case comes on for final hearing.

Under these circumstances, we deem it proper that, without costs in this Court to either party, the decree of the Circuit Court of Appeals be modified by recognizing that the decree in the District Court was only interlocutory, by directing an injunction pending the suit, and by remanding the cause to the District Court for proceedings on final hearing, with liberty to that court, among other things, to allow amendment of the pleadings.[3]

Decree modified and cause remanded to District Court.

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[3] Compare *Estho* v. *Lear,* 7 Pet. 130; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins,* 176 U. S. 167, 179; *United States* v. *Rio Grande Dam & Irrigation Co.,* 184 U. S. 416, 423; *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 223 U. S. 349, 364.

CITY OF HAMMOND *v.* FARINA BUS LINE & TRANSPORTATION COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 68. Submitted October 26, 1927.—Decided November 21, 1927.

Case involving contentions, issues of fact and of law, and character of evidence introduced, largely similar to those in *City of Hammond* v. *Schappi Bus Line, ante,* p. 164, remanded to District Court upon considerations explained in that opinion.
Decree of Circuit Court of Appeals modified.

CERTIORARI, 273 U. S. 675, to a decree of the Circuit Court of Appeals which reversed a decision of the District Court dismissing the bill in a suit to enjoin the enforcement of a city ordinance restricting the use of streets by motor busses.

Messrs. Louis T. Michener, C. B. Tinkham, and *Gerald Gillett* for petitioner.

Messrs. Jesse J. Ricks and *Edmond W. Hebel* for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was commenced in the federal court for Indiana in June, 1925; and is here on certiorari to the Circuit Court of Appeals. 273 U. S. 675. As in *City of Hammond* v. *Schappi Bus Line, Inc., ante,* p. 164, the plaintiff, Farina Bus Line and Transportation Company, is an Illinois corporation; the defendant is the City of Hammond; the relief sought is an injunction to prevent the enforcement of ordinance No. 1945, adopted May 23, 1925; and the relief was denied by the District Court without finding any facts and without opinion. The Circuit Court of Appeals reversed the decree and remanded the case with directions "to enter a decree granting the injunction." The decision was rendered on the same day

on which that court rendered its decision in the *Schappi* case. It, also, made no finding of facts. It filed no opinion and gave no reasons for its action save the statement that "the discussion there applies equally to this case."

The Farina Company operates a route from several small cities in Illinois through the Town of Munster, Indiana, to its terminal in the business district of Hammond. There, its busses connect with an allied street railway, which extends from Hammond into the City of Gary, Indiana; and through passengers from the Illinois cities to Gary pass over this route. A small percentage of the business is intercity traffic between Munster and Hammond; and, hence, intrastate. The Farina Company holds a certificate of public convenience and necessity issued by the Public Service Commission of Indiana under the Acts of 1925 for all its routes. The Farina Company alleges that the ordinance, if enforced, will necessitate abandonment, not only of the existing routes, but of its business. The evidence, consisting mainly of affidavits, is conflicting.

The contentions, the issues of fact and of law, and the character of the evidence introduced, are largely similar to those in the *Schappi* case. But there are differences which may be important. The Calumet Company does not serve Munster or the small Illinois cities, so that it is not a direct competitor of the plaintiff. None of the busses carry local passengers within the City of Hammond. There is also a difference in the stage of the proceedings at which this case came before the Court of Appeals. It was heard on appeal from the final decree. An application for an interlocutory injunction had been made; but the cause was later submitted to the District Court by agreement of the parties, as upon final hearing, and the bill was dismissed.

The considerations which led this Court to remand the *Schappi* case to the District Court for further proceedings

on final hearing are applicable in the main also to this case. We think that it should be heard by the District Court anew upon final hearing upon evidence to be adduced. To this end, the decree entered in the Court of Appeals is affirmed in so far as it reversed the decree dismissing the bill. In so far as it directs that an injunction issue, it is modified to the extent of directing an injunction pending the suit instead of a permanent injunction, the propriety of the latter being reserved until the final hearing. The cause is remanded to the District Court for further proceedings on final hearing, that court to have liberty, among other things, to allow amendment of the pleadings. Costs in this Court are not allowed to either party.

Decree modified and cause remanded to the District Court for further proceedings.

MASON v. ROUTZAHN, COLLECTOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 152. Argued October 6, 1927.—Decided November 21, 1927.

1. Dividends paid in 1917, when there were net profits made in 1916 sufficient for the purpose and no net profits had been made in 1917 prior to the payment, are taxable to the shareholder at the 1916 rate, though profits were accumulated by the corporation in 1917 subsequently to the payment of the dividends. Revenue Act 1916, § 31 (b) as amended 1917. See *Edwards* v. *Douglas*, 269 U. S. 204. P. 177.
2. The date of payment, not the date of declaration, of the dividend is the date of distribution within the meaning of § 31(b), *supra*. P. 178.

13 F. (2d) 702, reversed.

CERTIORARI, 273 U. S. 687, to a judgment of the Circuit Court of Appeals which reversed a judgment rendered by the District Court, 8 F. (2d) 56, in favor of Mason, plaintiff in an action to recover money paid to the Collector, under protest, as a tax on dividends.

Messrs. Horace Andrews and *Charles E. Hughes,* with whom *Messrs. S. M. Jett* and *Harrison Tweed* were on the brief, for petitioner.

Solicitor General Mitchell for respondent, was unable to support the reasoning of the Circuit Court of Appeals, but he felt constrained to present the case fully in deference to the views of that Court.

Messrs. Charles E. Hughes, Edward Cornell, William C. Breed, Paul Armitage, and *Harrison Tweed;* and *Mr. James E. MacCloskey, Jr.,* filed briefs as *amici curiae,* by special leave of Court.

Mr. Justice Brandeis delivered the opinion of the Court.

Section 31 (b), which was added to the Revenue Act of 1916 by the Revenue Act of 1917, October 3, 1917, c. 63, Title XII, 40 Stat. 300, 338, provides that any "distribution made to the shareholders . . in the year nineteen hundred and seventeen, or subsequent tax years, . . shall constitute a part of the annual income of the distributee for the year in which received," but that it "shall be deemed to have been made from the most recently accumulated undivided profits or surplus . . . and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits were accumulated." See *Edwards* v. *Douglas,* 269 U. S. 204.

Mason, a shareholder in the B. F. Goodrich Company, received during the year 1917, five dividends prior to July 3. Two of them had been declared in the year 1916; three in January, 1917. In his income tax return for 1917, he reported all these dividends as taxable at the 1916 rate, and paid on that basis. The Commissioner of Internal Revenue determined that the tax on all these dividends was payable at the 1917 rate, which was higher than that for 1916; and assessed the additional amount.

It was paid under protest. Then this suit was brought against the Collector, in the federal court for northern Ohio, to recover the amount exacted. The case was heard without a jury upon stipulated facts, which were adopted by the court as its findings. The District Court entered judgment for Mason for the full amount, 8 F. (2d) 56. Its judgment was reversed by the Circuit Court of Appeals, 13 F. (2d) 702. This Court granted a writ of certiorari, 273 U. S. 687.

The Government admits that no profits were earned in 1917 prior to the payment of the dividends here in question. Mason claims, as to two of the dividends, that the 1916 rate applied, because the dividends had been declared in that year; and as to all the dividends, that the 1916 rate applied, since the corporation had not earned in 1917 any net profits prior to the dates of the several dividend payments, so that the most recently accumulated net profits were those earned in the year 1916, which were more than sufficient for this purpose.

The District Court held that, despite the fact that the profits for 1917 were in excess of all dividends paid in that year, the distribution must be deemed to have been made out of profits accumulated in 1916; and entered judgment for the full amount. Thereafter, and before this case was heard in the Court of Appeals, *Edwards* v. *Douglas* was decided by this Court. The Court of Appeals recognized that *Edwards* v. *Douglas* differed in its facts from the case at bar. But it concluded that, under the reasoning of the opinion in that case, the taxing year should be treated as a unit; and it believed that it was required to hold that, if the net profits of a whole year prove sufficient to meet all the dividends paid within it, these must be deemed to have been paid from such profits, even if it affirmatively appears that none had been earned before the date when the latest dividend was paid.

The Solicitor General concedes that *Edwards* v. *Douglas* does not so decide; that the case is authority only for

the proposition that a pro rata share of the entire year's earnings may be treated as approximating the actual earnings for the fraction of the year prior to the payment of the dividend in the absence of circumstances showing that there were no earnings actually accumulated during the fractional period; that the amount actually available for payment of dividends out of the current year's earnings prior to the date of payment may always be shown; that such had been the practice of the Treasury Department from the time the Revenue Act of 1917 took effect until the date of the Court of Appeals' decision; and that this rule was embodied in its regulations.

We see no good reason for disturbing the long settled practice of the Treasury Department. Its contemporary interpretation is consistent with the language of the Act; and its practice was, in substance, embodied in the Revenue Act of 1918, February 24, 1919, c. 18, § 201 (e), 40 Stat. 1057, 1060. We conclude that the Circuit Court of Appeals placed an erroneous construction on § 31 (b).

Since two of the dividends paid in 1917 were declared in 1916, it becomes necessary for us to consider whether these also are to be deemed distributions made in 1917, as it is only to such that the section applies. It declares that the dividend is income of the shareholders in the year in which it is "received." We think it clear that, for this purpose, the date of payment, not the date of the declaration of the dividend, is the date of distribution; and as all the dividends here in question were paid in 1917, the provision as to the rate is applicable to all. As there were no earnings in 1917 prior to the dates of the payments, and as there were confessedly ample accumulated earnings of 1916 prior to the declaration of the several dividends, we have no occasion to consider other questions which were argued. The judgment of the Circuit Court of Appeals is reversed; that of the District Court is affirmed.

Reversed.

NEWS SYNDICATE COMPANY *v.* NEW YORK CENTRAL RAILROAD COMPANY ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 235. Argued October 5, 6, 1927.—Decided November 21, 1927.

1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, the Interstate Commerce Commission has jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate, for the ascertainment of damages. P. 186.
2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, has jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable. P. 187.
3. When the Interstate Commerce Commission has made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, a suit thereon can be maintained solely against the United States carrier. P. 188.
4. An inquiry from the Circuit Court of Appeals (Jud. Code § 239) which is not specific or confined to any distinct question or proposition of law, need not be answered. P. 188.

RESPONSE to questions propounded by the Circuit Court of Appeals on review of a judgment from the District Court dismissing a suit on a reparation order.

Mr. Luther M. Walter, with whom *Messrs. John S. Burchmore* and *Nuel D. Belnap* were on the brief, for the News Syndicate Co.

Congress has power to make carriers operating in the United States and subject to its laws liable for damages resulting from the exaction of an unreasonable joint through rate maintained by the joint action of American and Canadian lines and applied to a transportation service rendered from a point in Canada to a point in the United States. *Gibbons* v. *Ogden,* 9 Wheat. 1.

The Interstate Commerce Commission has uniformly upheld its own jurisdiction to award reparation for damages resulting from the application of an unreasonable joint through rate from a point in Canada to a point in the United States. *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. R. Co.,* 233 U. S. 479; 15 Ruling Case Law, 124, 130; *Internat. Nickel Co.* v. *Director General,* 66 I. C. C. 627; *Broedel-Donovan Lumber Mills* v. *Director General,* 68 I. C. C. 96; *American Cyanamid Co.* v. *Director General,* 69 I. C. C. 337; *Arnhold Brothers* v. *Director General,* 69 I. C. C. 685; *United States Graphite Co.* v. *Director General,* 88 I. C. C. 157; *Texas & Pacific R. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Southern Pacific* v. *Railroad Commission,* 194 Cal. 734.

The courts have repeatedly construed the Interstate Commerce Act as applying to commerce between the United States and foreign countries. *United States* v. *Grand Trunk Ry.,* 225 Fed. 283; *Galveston, H. & San Antonio Ry.* v. *Woodbury,* 254 U. S. 357; *Western Union* v. *Esteve Brothers & Co.,* 256 U. S. 566; *Armour & Co.* v. *United States,* 153 Fed. 1; aff'd. 209 U. S. 56.

The Commission and the courts can compel the payment of damages by carriers operating within the United

States, even though the Canadian carriers can not be reached *Louisville & Nashville R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *Internat. Nickel Co.* v. *Director General*, 66 I. C. C. 627; *I. C. C.* v. *L. & N. R. R. Co.*, 118 Fed. 613.

The jurisdiction of the Commission does not depend on the form of rate publication. *C., N. O. & T. P. R. R.* v. *I. C. C.*, 162 U. S. 184; *Illinois Central* v. *I. C. C.*, 206 U. S. 441; *Minneapolis & St. Louis Ry.* v. *Minnesota, ex rel. Railroad & Warehouse Commission*, 186 U. S. 257; Elkins Act, 32 Stat. 847; 34 Stat. 584.

The joint through rate was carried in tariffs lawfully on file with the Commission, and shippers could not lawfully pay any other or different rate. Interstate Commerce Act, § 6, Par. 7; Elkins Act, § 1, 32 Stat. 847; 34 Stat. 584; *United States* v. *Grand Trunk Railway*, 225 Fed. 283; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357; *Armour & Co.* v. *United States*, 209 U. S. 56.

The whole amount by which the joint through rate was unreasonable accrued to the carriers operating within the United States in excess of the amount which would have accrued to said carriers if the rate found reasonable by the Commission had been in effect.

Mr. Parker McCollester, with whom *Mr. F. D. McKenney* was on the brief, for The New York Central Railroad Company.

Section 13 of Interstate Commerce Act provides for complaint only "of anything done . . . in contravention of the provisions" of the Act.

Sections 15 and 16 of Interstate Commerce Act authorize Commission to make findings and orders only with respect to violations of provisions of the Act.

A statute cannot ordinarily have extraterritorial effect. *Gal., H. & S. A. Ry.* v. *Wallace*, 223 U. S. 481; *N. Y. Cent. R. R.* v. *Chisholm*, 268 U. S. 29.

Application of the Act's provisions with respect to transportation between United States and a foreign country is limited to transportation "only in so far as such transportation . . . takes places within the United States." § 1.

That the rate for through transportation from a point in Canada to a point in the United States is published as a joint through rate, rather than as separate charges for the portions of the transportation on both sides of the international boundary, does not operate to extend the Commission's jurisdiction. The Commission would not have jurisdiction of through rate if portion for Canadian part of transportation were separately published.

That the portion of joint rate covering transportation in the United States is not separately shown in tariffs, does not prevent Commission from determining reasonableness thereof when facts as to such portion of the charge are presented to it. The Commission exercises similar authority in determining reasonableness of divisions under Section 15 of Interstate Commerce Act. *New England Divisions Case,* 261 U. S. 184.

The Commission has itself recognized this limitation of the application of the Act and of its jurisdiction, except in recent reparation cases. *Payment of Charges,* 59 I. C. C. 263; *Int. Paper Co.* v. *D. & H. Co.,* 33 I. C. C. 270; *Carey Co.* v. *G. T. W. Ry. Co.,* 36 I. C. C. 203; *Carlowitz & Co.* v. *C. P. Ry. Co.,* 46 I. C. C. 290; *Good* v. *G. N. Ry. Co.,* 48 I. C. C. 435; *Eastern Car Co.* v. *C. G. Ry.,* 51 I. C. C. 627; *Booth Fisheries Co.* v. *Am. Exp. Co.,* 53 I. C. C. 735; *American Cyanamid Co.* v. *Director General,* 69 I. C. C. 337; *Southern Acid etc. Co.* v. *A. & N. M. Ry. Co.,* 74 I. C. C. 641; *Elimination from Certain Routes,* 115 I. C. C. 609; *Rates on Petroleum,* I. & S. Docket No. 2871.

The only two classes of cases in which the Commission has attempted to deal with joint through rates to or from a foreign country are, first, cases in which it has ordered American carriers to cease from joining in rates believed by it to be unreasonable (*Publishers' Assoc.* v. *B. & O. R. R. Co.*, 98 I. C. C. 339; *Pulp & Paper Mills, Ltd.* v. *A. & W. Ry. Co.*, 120 I. C. C. 251), and second, cases in which it has awarded reparation to basis of lower joint through rates. *Int. Nickel Co.* v. *Director General*, 66 I. C. C. 627.

The Commission's authority to make a reparation order depends upon a determination by it of a violation of the Interstate Commerce Act, and only to the extent of the damages caused by such violation.

Section 8 of the Act imposes liability on a carrier only for damages caused by violation of its provisions. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Company*, 269 U. S. 217; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

The Commission has held itself without jurisdiction to award damages where conduct complained of did not violate the act. *Rosser & Fitch* v. *A. C. L. R. R. Co.*, 91 I. C. C. 611; *National Traffic League* v. *A. & R. R. R. Co.*, 61 I. C. C. 120; *Guyton & Harrington Co.* v. *L. & N. R. R. Co.*, 50 I. C. C. 546; *Bus Co.* v. *N. Y. C. R. R. Co.*, 45 I. C. C. 161; *Atlas Portland Cement Co.* v. *L. V. R. R. Co.*, 32 I. C. C. 487.

Since Section 1 of the Interstate Commerce Act limits the application of the provisions of the Act to transportation from Canada in so far as such transportation takes place within the United States, a determination that joint through rate covering the entire transportation is unreasonable is not a determination of a violation of the Act.

The difference between the functions of the Commission in awarding reparation and in prescribing rates for

the future, pointed out in decision in *Baer Brothers* v. *Denver & R. G. R. R.*, 233 U. S. 479, does not sustain difference in territorial extent of Commission's authority in the two classes of cases.

A finding of a violation of the Act is a prerequisite to an order prescribing rates for the future, as well as to an order for reparation. *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88; *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48.

If, as is conceded, the Commission could not in advance have prescribed lower rates to be charged on shipments here involved, it is inconsistent to hold that after shipments have moved it can accomplish same result and effect a retroactive reduction of rates by a reparation order. *N. Y. Cent. R. R.* v. *N. Y. & Penna. Co.*, 271 U. S. 124.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiff in error sued for amounts of reparation awarded by the Interstate Commerce Commission. Defendants in error demurred to the complaint, asserting that it failed to state a cause of action, and that the Commission's order was void for want of jurisdiction because it dealt solely with charges for transportation from a point in Canada to a point in the United States. The district court sustained the demurrer and gave judgment of dismissal. The case was taken to the Circuit Court of Appeals; and, after hearing the parties, that court certified certain questions concerning which it desires instructions for the proper decision of the cause. § 239, Judicial Code. U. S. C. Tit. 28, § 346.

The certificate shows that, June 28, 1923, plaintiff in error complained to the Interstate Commerce Commission against defendants in error and others that during the preceding two years it shipped numerous carloads of news-

print paper from Thorold, Ontario, to New York City, and bore charges exacted by defendants in error based on through rates of 37 cents per hundredweight prior to July 1, 1922, and 33.5 cents thereafter, and that these rates and the portions thereof applicable to the transportation within the United States were excessive, unduly discriminatory and unjustly prejudicial in violation of the Interstate Commerce Act; that the Commission found the rate in force between August 26, 1920, and July 1, 1922, unreasonable to the extent it exceeded 32 cents and the rate thereafter applied unreasonable to the extent that it exceeded 29.5 cents, and that plaintiff in error suffered damages in respect of its shipments after July 2, 1921, in the amounts by which the charges were so found to be unreasonable and was entitled to reparation from the carriers that "engaged in the transportation of those shipments within the United States."

The reports of the Commission set out in the certificate (95 I. C. C. 66; 102 I. C. C. 365) show that Thorold is a place in Ontario on the Canadian National Railways 30 miles from Black Rock, New York, where connection is made with the New York Central, the Delaware, Lackawanna and Western and other lines, and 12 miles from Suspension Bridge, New York, where connection is made with the New York Central, Lehigh Valley and other lines, and that Black Rock is 414 miles and Suspension Bridge is 447 miles from New York City. The rates complained of applied over several railroads from each of these junctions. No rates were made or published for the transportation from the international boundary to New York City. The Commission did not determine what would be just and reasonable rates for this transportation.

The questions certified follow.

"1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication

of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

"2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

"3. When the Interstate Commerce Commission has made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

"4. Did the District Court err in sustaining the demurrer to the said petition?"

As to question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New

York City. § 1 (1) and (2).* It was the duty of defendants in error to establish just and reasonable rates for that service. § 1 (5), § 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 231. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an "award of damages under the provisions of this Act for a violation thereof." § 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

As to question 2.—The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission

* United States Code, Title 49, chapter 1, contains the Interstate Commerce Act, preserving the section numbers.

and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, § 13 (1), and had jurisdiction to make the order. § 16 (1). The question should be answered in the affirmative.

As to question 3.—The statement of the case and what has been said as to questions 1 and 2 make it plain that this question should be answered in the affirmative.

As to question 4.—Section 239 authorizes the Circuit Court of Appeals to certify to this court "any questions or propositions of law concerning which instructions are desired for the proper decision of the cause." It is well-settled that this statute does not authorize the lower court to make, or require this court to accept, a transfer of the case. The inquiry calls for decision of the whole case. It is not specific or confined to any distinct question or proposition of law, and therefore need not be answered. *The Folmina,* 212 U. S. 354, 363; *United States* v. *Bailey,* 9 Pet. 267, 273–274; *United States* v. *Mayer,* 235 U. S. 55, 66, and cases cited.

Question 1 is answered "Yes, for the ascertainment of damages."

Question 2 is answered "Yes."

Question 3 is answered "Yes."

Question 4 is not answered.

ATWATER & COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 17. Submitted October 12, 1927.—Decided November 21, 1927.

1. Mere delays in crediting the owner with coal pooled in a coal exchange in obedience to an order made under the Lever Act for the

purpose of expediting shipments, was not a taking for a public use of the owner's power to dispose of the coal, nor did it create an implied contract of the United States to indemnify the owner against losses due to the delays and decline of market prices. P. 191.

2. The Court of Claims has no jurisdiction of a suit to recover compensation for property appropriated by the United States under § 10 of the Lever Act. P. 191.

60 Ct. Cls. 323, affirmed.

APPEAL from a judgment of the Court of Claims sustaining a demurrer and dismissing the petition in a suit by a shipper of coal claiming compensation for losses resulting from delays of the Government in allowing credit for coal pooled in a coal exchange during the war, as required by an order made under the Lever Act.

Messrs. Walter Carroll Low and *Carroll Blakely Low* were on the brief for appellant.

Solicitor General Mitchell and *Mr. Gardner P. Lloyd,* Special Assistant to the Attorney General, were on the brief for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

A demurrer to the amended petition was sustained; judgment dismissing the action was entered, and appeal was taken under §§ 242 and 243 of the Judicial Code, before the taking effect of the Amendment of February 13, 1925.

The substance of the allegations follows. Claimant was a shipper of coal. In June, 1917, there was organized an unincorporated association called the Tidewater Coal Exchange and rules were made for its operation. The purpose was to expedite the transfer of coal from cars to boats at certain Atlantic ports. August 23, 1917, the President, by virtue of the Lever Act, approved

August 10, 1927, c. 53, 40 Stat. 276, appointed a Fuel Administrator to carry out its provisions relating to fuel. The latter made an order that approved the rules of the exchange; designated its commissioner as his representative to carry out the order and rules; and required every shipper of coal for trans-shipment at such ports, on and after November 11, 1917, to consign the coal to the exchange in accordance with and subject to its rules. The defendant, acting through the Fuel Administrator, represented and agreed that any and all coal shipped subject to the order should be credited to the shipper in accordance with the rules of the exchange. The order and rules required that all coal shipped to such ports should be pooled with other shipments of the same classification, and that each shipper should be credited in the pools with coal equivalent to the amounts theretofore shipped by him. Claimant, at various times between November 11, 1917, and December 5, 1918, shipped coal to the exchange. "The defendant, acting through said United States Fuel Administrator, its duly authorized representative, withheld from and failed to credit" claimant for coal to which it was entitled, amounting in all to 34,143 net tons. Claimant was not given credit for these amounts until December 5, 1918. It was ready to receive the coal at the various times the credits should have been given. And there are allegations to show that, by reason of the facts above mentioned, claimant was damaged in the sum of $50,000.

Claimant's narration strongly suggests that the failure to give it timely credits was due to some fault or negligence on the part of those operating the exchange. But, recognizing the rule that the Government cannot be held for tort (*Bigby* v. *United States,* 188 U. S. 400), it seeks

recovery on the ground that its property was taken for public use entitling it to compensation under the Fifth Amendment.

No part of claimant's coal was consumed or appropriated by the Government. Claimant asserts that its power to dispose of the coal was taken and withheld until it got credit therefor. But, if that be assumed, there is nothing to indicate that the taking was for public use. Moreover, if property was appropriated for public use, the taking must have been under § 10 of the Lever Act (*Bedding Co.* v. *United States,* 266 U. S. 491), and the Court of Claims had no jurisdiction, as that section gave the district courts exclusive jurisdiction over controversies concerning compensation. *United States* v. *Pfitsch,* 256 U. S. 547; *Houston Coal Co.* v. *United States,* 262 U. S. 361.

Claimant contends that, even if there was no taking, the Government is liable on a contract implied in fact. It was not the Government's purpose to acquire any of claimant's property. The Fuel Administrator's order was made to expedite the movement of coal by subjecting it to the rules and operation of the exchange. And, as the credits were not withheld for any public purpose, the facts and circumstances alleged are clearly insufficient to imply an obligation on the part of the Government to indemnify claimant against losses due to delays and decline of market price. Cf. *Bothwell* v. *United States,* 254 U. S. 231; *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Omnia Co.* v. *United States,* 261 U. S. 502. Indeed, the circumstances rebut the existence of such an agreement. *Klebe* v. *United States,* 263 U. S. 188, 191; *Horstmann Co.* v. *United States,* 257 U. S. 138, 146.

Judgment affirmed.

MARRON *v.* UNITED STATES

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 185. Argued October 12, 1927.—Decided November 21, 1927.

1. The requirement of the Fourth Amendment that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. P. 195.
2. Under the Fourth Amendment and Title 18, U. S. Code, a search warrant describing intoxicating liquors and articles for their manufacture does not authorize the seizure of a ledger and bills of account found in a search of the premises specified in the warrant. P. 196.
3. Officers, in making a lawful search of premises where intoxicating liquors are being unlawfully sold, may lawfully arrest, without a warrant, a person there actually in charge of the premises and actually engaged, in the presence of the officers, in a conspiracy to maintain them, and may contemporaneously, as an incident to the arrest, seize account books and papers not described in the search warrant, but which are used in carrying on the criminal enterprise and are found on the premises and in the immediate possession and control of the person arrested. P. 198.

18 F. (2d) 218, affirmed.

CERTIORARI, 274 U. S. 727, to a judgment of the Circuit Court of Appeals affirming the conviction of Marron on a second trial for conspiracy to maintain a nuisance in violation of the Prohibition Act. See also 8 F. (2d) 251.

Mr. Hugh L. Smith, with whom *Mr. Benjamin L. McKinley* was on the brief, for petitioner.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. John J. Byrne,* Attorney in the Department of Justice, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

October 17, 1924, the above named petitioner, one Birdsall, and five others were indicted in the southern division of the northern district of California. It was charged that they conspired to commit various offenses against the National Prohibition Act, including the maintenance of a nuisance at 1249 Polk Street, San Francisco. § 37 Criminal Code (U. S. C., Tit. 18, § 88). One defendant was never apprehended; one was acquitted; the rest were found guilty. Of these, Marron, Birdsall, and two others obtained review in the Circuit Court of Appeals. The judgment was affirmed as to all except petitioner. He secured reversal and a new trial. 8 F. (2d) 251. He was again found guilty; and the conviction was affirmed. 18 F. (2d) 218.

Petitioner insists that a ledger and certain bills were obtained through an illegal search and seizure and put in evidence against him in violation of the Fourth and Fifth Amendments. The question arose at the first trial. The Circuit Court of Appeals held that the book and papers were lawfully seized and admissible. When the second conviction was before it, that court held the earlier decision governed the trial, established the law of the case, and foreclosed further consideration.

For some time prior to October 1, 1924, petitioner was the lessee of the entire second floor of 1249 Polk Street. On that day a prohibition agent obtained from a Unifed States commissioner a warrant for the search of that place, particularly describing the things to be seized—intoxicating liquors and articles for their manufacture. The next day, four prohibition agents went to the place and secured admission by causing the doorbell to be rung. There were six or seven rooms containing slot machines,

an ice box, tables, chairs and a cash register. The evidence shows that the place was used for retailing and drinking intoxicating liquors. About a dozen men and women were there and some of them were being furnished intoxicating liquors. The petitioner was not there; Birdsall was in charge. The agents handed him the warrant and put him under arrest. They searched for and found large quantities of liquor, some of which was in a closet. While in the closet, they noticed a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business. And they found beside the cash register a number of bills against petitioner for gas, electric light, water and telephone service furnished on the premises. They seized the ledger and bills. The return made on the search warrant showed only the seizure of the intoxicating liquors. It did not show the discovery or seizure of the ledger or bills. After indictment and before trial, petitioner applied to the court for the return of the ledger and bills and to suppress evidence concerning them. The application was denied. At the trial there was evidence to show that petitioner made most of the entries in the ledger and that he was concerned as proprietor or partner in carrying on the business of selling intoxicating liquors.

It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. *Agnello* v. *United States,* 269 U. S. 20, 34, and cases cited.

The petitioner insists that because the ledger and bills were not described in the warrant and as he was not arrested with them on his person, their seizure violated the Fourth Amendment. The United States contends that the seizure may be justified either as an incident to the execution of the search warrant, or as an incident to the

right of search arising from the arrest of Birdsall while in charge of the saloon. Both questions are presented. Lower courts have expressed divers views in respect of searches in similar cases. The brief for the Government states that the facts of this case present one of the most frequent causes of appeals in current cases. And for these reasons we deal with both contentions.

1. The Fourth Amendment declares that the right to be secure against unreasonable searches shall not be violated, and it further declares that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In *Boyd* v. *United States,* 116 U. S. 616, Mr. Justice Bradley, writing for the court, said (p. 624): "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'" And in *Weeks* v. *United States,* 232 U. S. 383, Mr. Justice Day, writing for the court, said (p. 391): "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the

exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

And the Congress in enacting the laws governing the issue and execution of this search warrant was diligent to limit seizures to things particularly described. Section 39 of Title 27, U. S. C., provides that such warrant may issue as provided in Title 18, §§ 611 to 631 and § 633.* Section 613 provides that a search warrant cannot be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing property and place to be searched. Section

* Section 25, Title II, Act of October 28, 1919, c. 85, 41 Stat. 305, 315, is § 39, Title 27, U. S. C. It provides that a search warrant may issue as provided in Title XI of the Espionage Act (June 15, 1917), 40 Stat. 217, 228. Title XI is §§ 611 to 631 and § 633, Title 18, U. S. C.

622 requires the officer executing the warrant to give to the person in whose possession the property taken was found a receipt specifying it in detail. Section 623 requires him forthwith to return the warrant to the judge or commissioner with a verified inventory and detailed account of the property taken. Section 624 gives the person from whom the property is taken a right to have a copy of the inventory. Section 626 provides that, if it appears that the property or paper taken is not the same as that described in the warrant, the judge or commissioner must cause it to be returned to the person from whom it was taken. And § 631 provides for punishment of an officer who willfully exceeds his authority in executing a search warrant.

The Government relies on *Adams* v. *New York*, 192 U. S. 585. That was a prosecution in a state court. It involved no search or seizure under a law, or by an officer, of the United States. Adams was convicted of having gambling paraphernalia in violation of the Penal Code of New York. It appeared that he occupied an office where were his desk, trunk, tin boxes and other articles. Officers came and stated that they had a search warrant. He said it was not his office. They arrested him, searched the place, found "policy slips," etc., and also papers relating to his private affairs. The policy papers were introduced in evidence. There were endorsements in his handwriting on some of them. Over his objection, the private papers were received to furnish specimens of his writing and to show that he occupied the office. He had taken no steps to secure the return of his private papers or to prevent their use as evidence. But at the trial he contended their seizure violated his right to be secure against unreasonable searches, and that their use as evidence compelled him to be a witness against himself in violation of the Fourth and Fifth Amendments, and in violation of similar provisions of

the state constitution. The Court of Appeals (176 N. Y. 351) held that the provisions of the Federal Constitution did not apply; that the use of the private papers as evidence did not violate the state constitution; declared that it expressed no opinion as to the seizure, and applied the rule that a court, when engaged in trying a criminal case, will not take notice of the manner in which the witnesses obtained papers offered in evidence. And this court, assuming without deciding that the Fourth and Fifth Amendments were applicable, held the use of the private papers as evidence did not violate any right safeguarded by these Amendments; and, after reference to the procedure at the trial, declared that "courts do not stop to inquire as to the means by which the evidence was obtained." The court did not decide whether the seizure violated the Fourth Amendment. It decided that the admission in evidence of the private papers did not infringe the Fourth or Fifth Amendments. The case does not support the Government's contention. And see *Weeks* v. *United States, supra,* 394–396; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; *Agnello* v. *United States, supra,* 34. And it is clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant. Cf. *Kirvin* v. *United States,* 5 F. (2d) 282, 285; *United States* v. *Kirschenblatt,* 16 F. (2d) 202; *Steele* v. *United States,* 267 U. S. 498.

2. When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. Every such place is by the National Prohibition Act declared to be a common nuisance, the maintenance of which is punishable by fine, imprisonment or both. § 21, Tit. II, Act of October 28, 1919, c. 85, 41 Stat. 305, 314 (U. S. C., Tit. 27, § 33). The officers were authorized to arrest for crime being committed in their presence, and

they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States, supra,* 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers* v. *United States,* 2 F. (2d) 146; *Kirvin* v. *United States, supra; United States* v. *Kirschenblatt, supra.* The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

Judgment affirmed.

STEELE, EXECUTOR, *v.* DRUMMOND.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 60. Argued October 20, 1927.—Decided November 21, 1927.

1. Review by certiorari will be confined to the question on which the petition for the writ was based. P. 203.
2. It is only because of the dominant public interest that one who has had the benefit of performance by the other party, is permitted to

avoid his own contract obligation on the plea that the agreement is illegal. It is a matter of great public concern that freedom of contract be not lightly interfered with. P. 205.

3. Only in clear cases will contracts be held void as against public policy. The principle must be cautiously applied to avoid confusion and injustice. P. 205.

4. Where nothing sinister or improper is done or contemplated under the contract, detriment to the public interest will not be presumed. P. 205.

5. A contract between S and D for construction of a railroad to connect with an existing railroad and extend to a town where D owned property, contained a promise by him to procure necessary franchises and ordinances from that town, and a promise by S that he would procure the company which was to own the new line and the company owning the existing one to operate regular trains over the two roads giving to the town above referred to the same service as that had by the one where they connected. D's purpose in making and performing the contract was to enhance the value of his property by the contemplated railroad facilities. S was a stockholder of the old company and took all the stock of the new one; *Held,* that neither of the two stipulations was shown to be against public policy. P. 206.

11 F. (2d) 595, affirmed.

CERTIORARI, 271 U. S. 658, to a judgment of the Circuit Court of Appeals, which reversed a judgment of the District Court dismissing on demurrer an action brought by Drummond to recover damages for breach of a contract between him and Steele.

Jurisdiction of the District Court was founded on diversity of citizenship.

Messrs. W. D. Thomson and *Harold Hirsch* were on the brief for petitioner.

The contract was illegal and void in its inception, because Drummond undertook thereby to "procure" at all events and regardless of the methods that might be necessary, the passage of certain ordinances. The contract did not specify just how Drummond was to procure them, but it did bind him at all events to procure them, and

had he failed to do so, he would have breached the contract and been liable in damages, and would also have failed to obtain the enhancement to his property holdings, which was the consideration moving him to act. Agreements to procure legislation are contrary to public policy and void. *Providence Tool Co.* v. *Norris,* 2 Wall. 45; *Hazelton* v. *Sheckels,* 202 U. S. 71; *Crocker* v. *U. S.,* 240 U. S. 74; *Meguire* v. *Corwine,* 101 U. S. 108.

The contract was illegal and void in its inception, because the obligation assumed by Steele to "procure," at all events and regardless of the methods that might be necessary, action on the part of public service corporations, of which he was a stockholder and officer, whether such action was for the benefit of their stockholders or merely to protect Steele from an action for damages on his personal covenant, was contrary to public policy. In order to comply with his contract and save himself from personal liability, he might be tempted to use his vote and official position to obtain corporate action of the railroad companies that was not to the best interest of their stockholders. *West* v. *Camden,* 135 U. S. 507; *Wardell* v. *Union R. Co.,* 103 U. S. 651; *Woodstock Iron Co.* v. *Richmond,* 129 U. S. 643.

If the contract was valid, Steele's personal liability terminated when he procured the installation of service by the two railroad companies and when the newly chartered railroad company in its corporate capacity accepted a deed from Drummond, which deed contained a provision under which the entire property reverted to Drummond if service was discontinued.

Mr. John A. Sibley, with whom *Mr. Daniel MacDougald* was on the brief, for respondent.

The contract is not in violation of public policy. The power to declare a commercial contract invalid because it violates public policy should be sparingly exercised by

courts. The courts will presume that the contract is valid and that no illegal means are contemplated unless there is something in the contract that carries a different conclusion. The only exception is in those contracts where the general scheme is of a corrupt nature. *Richardson* v. *Mellish,* 2 Bing. 229.

This Court fully recognized in the case of *Valdes* v. *Larrinaga,* 233 U. S. 705, that all contracts between parties the purpose of which is to obtain a concession from the Government or of a department thereof, are not invalid. See *Noble* v. *Meade-Morrison Mfg. Co.,* 237 Mass. 5; *C. C. Cole* v. *Brown-Hurley Hardware Co.,* 139 Ia. 487; *Burbank* v. *Jefferson City Gaslight Co.* 35 La. Ann. 444; *Greene* v. *Nash,* 85 Me. 148.

Since the rendition of the decision in the case of *Tool Company* v. *Norris,* 2 Wall. 45, this Court has permitted contracts to stand, which under the broad language of the *Norris* case would have been struck down. See *Nutt* v. *Knut,* 200 U. S. 12; and *McGowan v. Parish,* 237 U. S. 285.

The contract was not illegal and void from its inception, as contended. This is not a contract where an officer of a corporation agrees in consideration of a benefit to him to have the corporation of which he is an officer employ a third party; nor is it a contract in which one who occupies a fiduciary position, in consideration of a private benefit to himself, assumes an inconsistent position towards another; nor does it create a dual agency whereby an agent obtains secret profits at the expense of the principal. In essence it is an agreement by one person to protect the capital investment of another, under certain contingencies. These agreements are universally upheld by the courts. *Morgan* v. *Stuthers,* 131 U. S. 246; *Rogers et al.* v. *Burr, Administratrix,* 97 Ga. 10; *Vinton* v. *Pratt,* 228 Mass. 468; Cook on Corporations, 8 Ed. Vol. 2, pp. 1227, 1228, 1229.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent sued in the district court for the northern district of Georgia to recover damages for breach of contract. A general demurrer was interposed and sustained. The Circuit Court of Appeals held that one count stated a cause of action and reversed the judgment. The petition for certiorari was based on the contention that the contract in suit was contrary to public policy and void. No other question will be considered. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464.

The material allegations are: Panama City and St. Andrews are adjoining municipalities in Florida. These were rival cities whose resources were timber lands and fisheries awaiting development. A. B. Steele was a stockholder in the Atlanta and St. Andrews Bay Railway Company, which operated a railroad between Dothan, Alabama, and Panama City. He was interested in a lumber company which was a large stockholder in the railway company. Drummond owned much land in St. Andrews, and some of it was on St. Andrews Bay. Steele desired to extend the railway from Panama City to the bay. Drummond was willing to cooperate with him to that end. His purpose was to enhance the value of his lands by procuring railroad facilities for St. Andrews equal to those at Panama City. Steele agreed to procure a charter for a railway company; to convey to it a right of way within Panama City; to furnish all the iron and steel for track material; to deliver the cross ties which were to be furnished by Drummond; and to procure the proposed company, in conjunction with the Atlanta & St. Andrews Bay Railway Company, to operate regular trains over

the two roads from Dothan to St. Andrews, giving the latter the same service as that had by Panama City. Drummond agreed to obtain and convey to the new company a right of way within St. Andrews, "and to procure necessary franchises and ordinances from the town of St. Andrews"; to pay the cost of clearing and grading the whole line, furnish and lay all ties, build necessary trestles and culverts, lay the rails, and put in a wye; and to cause a tract of terminal land fronting on St. Andrews Bay to be conveyed to the new company. Steele procured the charter; organized a company and became owner of all its stock. And, at his instance, Drummond conveyed the completed railroad to the new company. Steele caused the railway service to be furnished as agreed until August, 1921, when operation ceased. Service at Panama City continued. Except for the covenant in respect of service for St. Andrews, Drummond would not have made the contract. This was known to Steele. And it is alleged that to perform on his part, Drummond expended $53,178.11; and that, by reason of Steele's failure to cause continuous service, Drummond's expenditures became a total loss.

Petitioner contends that the contract is illegal and void because respondent's undertaking to procure the passage of the ordinances was contrary to public policy. In *Marshall* v. *Baltimore and Ohio Railroad Company,* 16 How. 314, Mr. Justice Grier, delivering the opinion of the Court, said (p. 334): "It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Public policy and sound morality do therefore imperatively require that courts should put the stamp of their

disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." And then, to make distinction between legitimate action and the contract condemned in that case, it is said: "All persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice." While the principle is readily understood, its right application is often a matter of much delicacy. It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. *Baltimore & Ohio Southwestern Ry.* v. *Voigt,* 176 U. S. 498, 505. The meaning of the phrase "public policy" is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. 1 Story on Contracts, (5th ed.) § 675. *Pope Mfg. Company* v. *Gormully,* 144 U. S. 224, 233. It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. *Atlantic Coast Line R. R. Co.* v. *Beazley,* 54 Fla. 311, 387; *Barrett* v. *Carden,* 65 Vt. 431, 433; *Richmond* v. *Dubuque & Sioux City R. R. Co.,* 26 Ia. 191, 202; *Egerton* v. *Earl Brownlow,* 4 H. L. Cas. 1, 122; *Richardson* v. *Mellish,* 2 Bing. 229, 242, 252. Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. *Valdes* v.

Larrinaga, 233 U. S. 705, 709. The contract here under consideration is to be distinguished from those dealt with in *Tool Company* v. *Norris,* 2 Wall. 45; *Trist* v. *Child,* 21 Wall. 441; *Meguire* v. *Corwine,* 101 U. S. 108; *Oscanyan* v. *Arms Company,* 103 U. S. 261; *Hazelton* v. *Sheckells,* 202 U. S. 71, and *Crocker* v. *United States,* 240 U. S. 74. The claims there considered were under contracts requiring or contemplating the obtaining of legislative or executive action as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means.

But this case is different. Drummond was not employed by Steele or by the railroad company to secure the passage of the ordinances. He was interested as an owner of property. Neither the contract, nor what was done, suggests that the location or construction of the proposed line was not a legitimate enterprise undertaken for the public good, or that anything improper was contemplated as a means to secure the passage of the ordinances. Drummond's object was to obtain the railway service; and, for that purpose, he expended a large sum. The mere fact that he owned property that might be favorably affected does not tend to discredit him or to make evil his undertaking to obtain the ordinances. His interest in having the railroad extended into St. Andrews gave him the right in every legitimate way to urge the passage of appropriate ordinances. There is nothing that tends to indicate that in the promotion or passage of them there was any departure from the best standards of duty to the public. The contention that Drummond's agreement to secure their passage was contrary to public policy cannot be sustained. *Cole* v. *Brown-Hurley Co.,* 139 Ia. 487; *Burbank* v. *Gas Company,* 35 La. Ann. 444; *Greene* v. *Nash,* 85 Me. 148. Cf. *Houlton* v. *Nichol,* 93 Wis. 393; *Noble* v. *Mead-Morrison Mfg. Co.,* 237 Mass. 5, 21.

Petitioner also contends that the contract contravened public policy and is void because Steele agreed to procure the specified service to be given St. Andrews. The argument is that, in order to keep his covenant, he might be tempted to use his vote to obtain corporate action of the railroad companies that was not to the best interest of their stockholders. But the contention has no foundation of fact on which to rest. As shown above, it must be clearly established that public policy would be violated before Steele may raise that objection to prevent enforcement of the contract. The allegations do not indicate that the carriers were not in duty bound to give equality of service to these adjoining and competing towns; and, for aught that appears, their interests would have been served best by continuing operation over the new line. It does not appear that the giving of the service would have resulted to the disadvantage of either company or its shareholders. Steele took all the stock of the new company; it does not appear that it ever had any other stockholders. The facts alleged fail to show that performance would tend to constitute a fraud upon the old company or its stockholders or tend in any degree to injure them. It would be mere speculation to say that the transaction described has any tendency to bring Steele's personal interest into conflict with his duty as a voting shareholder.

Judgment affirmed.

WASHINGTON EX REL. STIMSON LUMBER COMPANY *v.* KUYKENDALL ET AL.

ERROR TO THE SUPREME COURT OF WASHINGTON

No. 66. Argued October 24, 1927.—Decided November 21, 1927.

1. Operators of towboats who hold themselves out as engaged in the business of common carriers in the towing of logs in Puget Sound

and adjacent waters, and who for that purpose devote their towboats to public use, are common carriers, not because of any legislative fiat, but by reason of the character of their business, and are subject to legislative regulation of their rates for such towage. P. 211.

2. The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers, does not affect this question and a notice in the carrier's tariff that all tows are at the owner's risk is immaterial, since a common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. P. 211.
3. A state regulation fixing reasonable rates for towage of logs by common carriers does not deprive shippers of property in violation of the Fourteenth Amendment by preventing them from securing lower rates through private contract with such carriers. P. 212.

137 Wash. 602, affirmed.

ERROR to a judgment of the Supreme Court of Washington sustaining an order of the Department of Public Works of the State of Washington declaring a specified rate on the towage of logs to be just and fair, and directing a towage company to collect it for towage done for the relator, Lumber Company.

Mr. Charles A. Reynolds for plaintiff in error.

Mr. H. C. Brodie, with whom *Mr. John H. Dunbar* was on the brief, for defendants in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

October 17, 1924, the Department of Public Works, after hearing upon a complaint of relator, made an order which declared that a specified tariff rate for towing logs from Clifton to Lake Union in Seattle was "just, fair and no more than sufficient," and directed the Shively Towboat Company to collect from relator, charges based on that rate for towing done between March 1, and May 1, 1924. The superior court affirmed the order.

Relator appealed to the Supreme Court, and there challenged the validity of the order and statutory provisions under which it was made, on the ground that they are repugnant to the due process clause of the Fourteenth Amendment. The court held them valid and affirmed the judgment. 137 Wash. 602.

Relator got logs near Clifton and had a mill for the manufacture of lumber at Lake Union. The distance by water is about 100 miles. The Northwestern Towboat Owners Association, in accordance with an order of the Department, filed a tariff effective September 30, 1923. The tariff included maps showing Puget Sound and adjacent waters divided into zones; it named rates for towing between all points thereon; it contained a list of 50 operators, including the Shively Company, that concurred therein; it specified rates to be charged for towing ships, scows and logs between zones, and rates for many other services to be rendered by tugs. The rate specified for towing logs from the zone including Clifton to that including Lake Union was 94 cents per thousand feet. A note declared "all tows at owners risk," and stated that the tariff was intended to name rates for all services on Puget Sound and adjacent waters. Commencing March 1, 1924, the Shively Company towed logs for relator from Clifton to Lake Union; and, in accordance with an agreement between them, charged $16.50 per section. Either could terminate the arrangement at will. A supplement to the tariff, effective May 1, 1924, named $25 per section as the rate from Clifton to Lake Union. That rate was the same or a little less than 94 cents per thousand. Relator's logs were towed by the section, and the last mentioned rate was put in so that it would not have to scale the logs in order to ascertain the charges. June 6, 1924, relator complained to the Department asserting, among other

things not here material, that the business of towing logs was not affected with a public interest or within the jurisdiction of the Department. Then followed the hearing, order and judgments above referred to.

The statutes of Washington declare that towboats operated "for the public use in the conveyance of persons or property for hire over and upon the waters within this state" are common carriers. They require that charges made by common carriers "shall be just, fair, reasonable and sufficient"; that the carriers file with the Department of Public Works, schedules showing the rates to be charged; that the names of carriers, who are parties to joint tariffs, shall be specified therein; and that each party other than the one filing the tariff, shall file such evidence of concurrence as may be required. And the statutes make it unlawful for any such carrier to collect different compensation than that provided for in the schedules, and prohibit it from charging any person a greater or less compensation than that collected from others for like contemporaneous service. Other provisions authorize the Department to prescribe and enforce the rates to be charged by all common carriers, including towboats. Remington's Compiled Statutes, § 10344, *et seq.*

Relator does not here contest the reasonableness of the rate; it does not question the power of the State, or the authority of the Department, to prescribe and enforce reasonable rates for transportation by common carriers on Puget Sound and adjacent waters in Washington; it does not contend that, if the Shively Company was a common carrier of logs by towboat, the agreement for transportation of relator's logs for less than the tariff would be valid, or that the order complained of would not be valid. It is established that, consistently with the due process clause of the Fourteenth Amendment, a

private carrier cannot be converted into a common carrier by mere legislative command. *Frost Trucking Co.* v. *R. R. Commission,* 271 U. S. 583, 592; *Michigan Commission* v. *Duke,* 266 U. S. 570, 577.

It cannot reasonably be said that operators of towboats may not become common carriers in the towing of logs in Puget Sound and adjacent waters. The manufacture of lumber at mills located by these waters is one of the principal industries of the State. The forests are tributary to the Sound and waters connecting with it. Large quantities of logs are floated from the forests to the mills. Towboats are commonly used for that purpose. In all essential particulars, that service is like the carriage of freight in vessels. The reasons for rate regulation are the same in one case as in the other. Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier. *Propeller Niagara* v. *Cordes,* 21 How. 7, 22. The tariff filed by the Northwestern Towboat Owners Association shows that 50 owners held themselves out as engaged in the business of common carriers, including the towing of logs; and, for that purpose, they devote their towboats to the use of the public. They are common carriers, not because of legislative fiat, but by reason of the character of the business they carry on. The statute does not attempt to make all towboats common carriers. Its application is limited to those operated in public use for hire. The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers * does not affect the question under consideration. And the notice in the tariff that all tows are at owner's risk is immaterial. "A common carrier is such by virtue of his occupation, not by

* *The Steamer Webb,* 14 Wall. 406, 414; *The Margaret,* 94 U. S. 494, 496; *Transportation Line* v. *Hope,* 95 U. S. 297, 300.

virtue of the responsibilities under which he rests." *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440. The Shively Company stands the same as the other parties to the tariff. It was engaged in the general towboat business; it towed logs for others as well as for relator; it held itself out as a common carrier in that line of business, and by the tariff gave public notice to that effect. Its towboat was devoted to the public use, among other things, for the transportation of logs. By its own choice, it became a common carrier. *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252. The State had power to regulate its charges. *Munn* v. *Illinois*, 94 U. S. 113. The purpose of the regulations complained of is to establish reasonable rates to be charged, and to prevent unjust discrimination, by public carriers. Such regulations would be of little value if the state law permitted the shippers by private contract with public carriers to obtain the towing of their logs for less than the prescribed rates. Relator was free to have its logs towed by a private carrier for such compensation as might be agreed and without regard to the rates established by the Department. The order was not aimed at any such transaction. It being conceded here that the charges in question are not excessive, the relator's contention that the state rate regulation deprives it of its property in violation of the Fourteenth Amendment has no foundation.

Judgment affirmed.

MELLON, DIRECTOR GENERAL, *v.* O'NEIL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 74. Submitted October 26, 1927.—Decided November 21, 1927.

This Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively

appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. P. 214.
Writ of Error to 215 App. Div. 766, dismissed; certiorari denied.

ERROR to a judgment of the Appellate Division of the Supreme Court of New York which affirmed a judgment of the Trial Term. Leave to appeal to the Court of Appeals was denied.

Messrs. Clifton P. Williamson and *Herbert S. Ogden* were on the brief for plaintiff in error.

Mr. Nathan Ballin was on the brief for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction under the writ of error.

The writ is brought to review a judgment of the Appellate Division of the Supreme Court of New York, which affirmed, without opinion, a judgment rendered at Trial Term against the plaintiff in error, as Agent designated by the President, under the Transportation Act, 1920. 215 App. Div. 766. Leave to appeal to the Court of Appeals was denied both by the Appellate Division and by the Court of Appeals; and the judgment of the Appellate Division thereby became the final decision of the highest court of the State in which a decision could be had.

This judgment was entered after the Jurisdictional Act of 1925 [1] took effect. The only error assigned here

[1] 43 Stat. 936, c. 229; printed as an Appendix to the Revised Rules of this Court, 266 U. S. 687.

that presents a ground for the writ of error under § 237 of the Judicial Code as amended by § 1 of this Act,[2] is that the provisions of the New York Civil Practice Act, relating to the amendment of process and substitution of parties, as applied in allowing the substitution of the predecessor of the plaintiff in error as the party defendant, are invalid because of repugnancy to the laws of the United States.

The record, however, does not show that this question was either presented to or passed upon by the Appellate Division. No reference to the Practice Act or challenge to its validity appears in the proceedings either at Trial Term or in the Appellate Division.[3]

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Whitney* v. *California*, 274 U. S. 357, 360;

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[2] Sec. 237 (a) of the Judicial Code, as thus amended, now provides that: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

[3] In this respect, the present case is essentially different from *Davis* v. *Cohen Co.*, 268 U. S. 638, 640, in which the plaintiff in error had at the outset challenged the validity of any provisions of the Massachusetts Laws purporting to authorize the proceeding by which he had been substituted as the party defendant, as being repugnant to the Transportation Act, and had preserved this objection at every stage of the case.

and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature. *Dewey* v. *Des Moines*, 173 U. S. 193, 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 634; *Whitney* v. *California*, *supra*, 362.

For these reasons the writ of error must be dismissed. And, regarding the writ, under the Jurisdictional Act, as a petition for certiorari, it is denied.

Writ of error dismissed for want of jurisdiction; certiorari denied.

WILLCUTS, COLLECTOR, *v.* MILTON DAIRY COMPANY

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 156. Argued October 6, 7, 1927.—Decided November 21, 1927.

Under Revenue Act, 1918, Title III, providing that the "excess-profits" credit of a domestic corporation should "consist of a specific exemption of $3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year," (§ 312) and defining "invested capital," with certain exceptions, as the actual cash and cash value of other property bona fide paid in for stock or shares, at the time of such payment and "(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year." *Held*, that the term "undivided profits" is employed in its ordinary meaning of an excess in the aggregate value of the assets of a corporation over the sum of its liabilities, including capital stock, so that profits earned by a corporation which were insufficient to offset an impairment of its paid-in capital, were not "undivided profits," to be included as "invested capital" in computing the excess-profits credits allowed by the Act. P. 218.

8 F. (2d) 178 (D. C.), affirmed.

15 F. (2d) 814 (C. C. A.), reversed.

CERTIORARI, 273 U. S. 687, to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court in favor of the Collector in a suit brought by the Dairy Company to recover excess-profits taxes.

Solicitor General Mitchell, with whom *Assistant Attorney General Willebrandt,* and *Messrs A. W. Gregg,* General Counsel, and *J. R. Wheeler,* Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Messrs. Haydn S. Cole and *Ira C. Oehler* for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Dairy Company, a Minnesota corporation, brought this suit against the Collector to recover additional excess-profits taxes assessed against it under Title III of the Revenue Act of 1918[1] for its taxable years 1919 and 1920,[2] and paid under protest. Judgment for the Collector in the District Court, 8 F. (2d) 178, was reversed by the Circuit Court of Appeals. 15 F. (2d) 814.

The question here is, whether profits earned by the Company that were insufficient to offset an impairment of its paid-in capital, were "undivided profits" to be included as "invested capital" in computing the excess-profits credits allowed by the Act.

Section 312 of the Act provided that the "excess-profits credit" of a domestic corporation should "consist of a specific exemption of $3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year." Section 326 (a) defined the term "invested capital," with certain exceptions not now material, as the actual cash

[1] 40 Stat. 1057, 1088, c. 18.

[2] These were the fiscal years of the Company ending on the last day of February in 1919 and 1920, respectively. They are designated, in accordance with §§ 200 and 300 of the Act, by the years in which they ended.

and cash value of other property, bona fide paid in for stock or shares, at the time of such payment, and "(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year." Art. 838 of Treasury Regulations 45 [3] declared that: "Only true earned surplus and undivided profits can be included in the computation of invested capital, . . . In the computation . . . full recognition must first be given to all expenses incurred and losses sustained from the original organization of the corporation down to the taxable year. . . . There can, of course, be no earned surplus or undivided profits until any deficit or impairment or paid-in capital due to depletion, depreciation, expense, losses, or any other cause has been made good."

The Company was organized with a paid-in capital of $145,817.04. At the end of 1917 [4] an operating deficit of $70,296.12, shown on the books, impaired the capital to that extent. In 1918, the Company had a net income of $11,489.26; and in 1919, a net income of $22,908.14. These earned profits were not distributed, and $29,853.03 thereof remained in the business at the end of 1919, without having been applied to reduce the impairment of the capital.

In the returns on which the excess-profits taxes were originally assessed and paid, the Company, treating these earnings as "undivided profits" constituting part of its "invested capital," reported as invested capital for 1919 the sum of the paid-in capital, $145,817.04, and the profits, $11,489.26, earned in 1918; and as invested capital for 1920, the sum of the paid-in capital and the $29,853.03 of profits earned in 1918 and 1919 and remaining in the business.

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[3] Regulations 45 (1920 Ed.), p. 204.

[4] The references in this opinion are to the taxable years, designated as stated in note 2, *supra*.

Thereafter, on an audit of the returns, the Commissioner of Internal Revenue, while allowing for each year as "invested capital" the amount of paid-in capital, excluded from the computation of the "invested capital" the amounts claimed as "undivided profits," on the ground that they did not constitute true "undivided profits," but should be applied to reduce the impairment of the capital. And on the basis of such exclusions he assessed the additional taxes.

We think that clause (3) relating to "surplus and undivided profits" was correctly interpreted by Art. 838 of the Treasury Regulations. Both these terms, as commonly employed in corporate accounting, denote an excess in the aggregate value of all the assets of a corporation over the sum of all its liabilities, including capital stock. See *Edwards* v. *Douglas,* 269 U. S. 204, 214; *Insurance Co. of North America* v. *McCoach* (D. C.), 218 Fed. 905, 908. Aside from the fact that a surplus may not only be "earned," as where it is derived from undistributed profits, but "paid-in," as where the stock is issued at a price above par, the distinction between these terms, as commonly employed, is that the term "surplus" describes such part of the excess in the value of the corporate assets as is treated by the corporation as part of its permanent capital, usually carried on the books in a separate "surplus account"; while the term "undivided profits" designates such part of the excess as consists of profits "which have neither been distributed as dividends nor carried to surplus account." *Edwards* v. *Douglas, supra,* 214. But it is a prerequisite to the existence of "undivided profits" as well as a "surplus," that the net assets of the corporation exceed the capital stock. Hence, where the capital is impaired, profits, though earned and remaining in the business, if insufficient to offset this impairment do not constitute "undivided profits."

We cannot doubt that this term was used in clause (3) with its ordinary meaning, nor agree with the view of the Circuit Court of Appeals that the arbitrary definition given by the Act to the term "invested capital" not equivalent to that of the ordinary invested capital of commerce, indicates that the words "surplus and undivided profits" were not used with their ordinary meaning as conditioned by an excess of assets. We do not think Congress intended that a corporation whose capital was impaired should be entitled to treat profits that, though earned, were insufficient to make good the impairment and create a surplus, as "undivided profits." This would not only give the term "undivided profits" a meaning entirely at variance with ordinary usage—making it merely equivalent to any earned profits remaining in the business—but would grant the privilege of twice disregarding the impairment of capital, that is, once in computing the paid-in capital, which under the express terms of the Act was to be taken at the full cash or money value at the time of payment, and again in computing the "undivided profits." This term is entirely inapt to express such a purpose.

This conclusion is in harmony with the general view expressed in *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 388. Dealing there in another aspect with the Revenue Act of 1917, which contained a similar clause concerning the inclusion of "paid-in or earned surplus and undivided profits" as "invested capital" in determining the amount of the excess-profits tax, this Court said, *arguendo*, that in order to avoid exaggerated valuation of invested capital "the act resorted to the test of including nothing but money, or money's worth, actually contributed or converted in exchange for shares of the capital stock, or actually acquired through the business activities of the corporation . . . and coming in *ab extra*, by

way of increase over the original capital stock," and that the provision including "paid in or earned surplus and undivided profits used or employed in the business" recognized "that in some cases contributions are received from stockholders in money or its equivalent for the specific purpose of creating an actual excess capital over and above the par value of the stock." And see *Appeal of Valdosta Grocery Co.*, 2 B. T. A. 727, 729, and *Appeal of Gould Copper Co.*, 5 B. T. A. 499, 517.

The fact that under Title II of the Revenue Act of 1918 providing for an income tax, a corporation, as was held in *Long Beach Improvement Co.* v. *Commissioner of Internal Revenue*, 5 B. T. A. 590, was subject to a tax upon its net income despite an impairment of its capital, is not of moment. The deductions from gross income allowed by that Title do not refer to invested capital, surplus or undivided profits, and its provisions throw no light upon the meaning of those terms as used in Title III providing for an excess-profits tax.

The judgment of the District Court is affirmed; and that of the Circuit Court of Appeals

Reversed.

BLAIR, COMMISSIONER, *v.* OESTERLEIN MACHINE COMPANY.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 210. Argued October 10, 1927.—Decided November 21, 1927.

1. The Board of Tax Appeals, in reviewing a refusal by the Commissioner of Internal Revenue to apply special assessment provisions of the Revenue Act of 1918, may subpœna the Commissioner to answer interrogatories and furnish information from returns of other taxpayers relevant to the inquiry. P. 224.
2. The authority of the Board of Tax Appeals to review a determination of the Commissioner finding a deficiency in respect of a tax, Revenue Act, 1924, §§ 900 (e), 273, 274, extends to determinations

under §§ 327 and 328 of the Revenue Act of 1918, which provide for computation of the excess-profits tax of a corporation, in certain cases, upon the basis of a comparison with tax returns of other corporate taxpayers similarly situated. P. 226.

3. The Board's appellate powers are not limited by § 1018 of the Act, prohibiting the publication by Collectors of information gained in the course of their duties. P. 227.

4. In his final determination of the taxpayer's taxes for 1918 and 1919 the Commissioner considered the returns for those years together, reduced the 1918 tax and increased the 1919 tax, and found the net balance as a deficiency. The question whether under § 274, authorizing review by the Board only of the Commissioner's determination of a "deficiency," the Board was empowered to consider his treatment of the 1918 tax was not raised before the Board or the courts below and not specified in the petition for certiorari. *Held*, that it will not be considered by this Court. P. 225.

17 F. (2d) 663, affirmed as modified.

CERTIORARI, 274 U. S. 730, to a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District of Columbia, commanding the Commissioner of Internal Revenue to respond to a subpœna of the Board of Tax Appeals.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Messrs. A. W. Gregg*, General Counsel, and *Charles T. Hendler*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. J. Robert Sherrod, with whom *Messrs. John J. Hamilton* and *Robert N. Miller* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a proceeding brought in the Supreme Court of the District of Columbia under § 1025 (a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 348; U. S. C., Title 26, § 1258) to compel the Commissioner of Internal Revenue to respond to a subpœna of the Board of Tax Appeals issued under § 900 (i) requiring him to answer interroga-

tories, and to furnish information contained in the tax returns of twelve corporations. The Commissioner denied the authority of the Board to require a response to the subpœna. A decree upholding the jurisdiction of the Board and ordering the Commissioner to obey was affirmed by the Court of Appeals of the District, 17 Fed. (2d) 663. The case is here on certiorari. 274 U. S. 730.

Respondent corporation returned and paid excess profits taxes for the years 1918, 1919 and 1920. In the final determination of these taxes the Commissioner considered together the returns for all three years. He reduced the 1918 tax, increased the 1919 tax, and found the net balance as a deficiency. In fixing the amount of the tax for 1918, the Commissioner, as requested by the taxpayer in an amended return for that year, made a special assessment under §§ 327 and 328 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093), but decided that no grounds existed for a special assessment for the year 1919, and so determined the tax for that year using the ordinary assessment method provided by §§ 301, 311 and 312.

The invested capital of the corporation taxed is one of the necessary factors in the computation of the tax under those sections. In evident anticipation that in some cases the Commissioner might find it difficult or impossible to ascertain the invested capital, or that in the disturbed economic conditions left by the war, the tax in some cases might be harsh in comparison with others, a special method of assessment for those cases (enumerated in § 327) was provided by § 328. These sections, printed in the margin,[1] authorize the computation of the excess profits tax

[1] Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective

on the basis of a comparison with the data contained in the tax returns of other corporate taxpayers similarly situated.

Respondent, on appeal to the Board of Tax Appeals, assailed the determination of the Commissioner on the ground that although the 1918 tax had been assessed under § 328, the standard of comparison applied was erroneous and resulted in an excessive assessment, and on the

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values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Sec. 328 (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business trans

ground that the tax for 1919 should have been assessed under § 328. As to the latter contention it set up that as the Commissioner had been unable satisfactorily to determine respondent's invested capital for 1917 and 1918, he could not have done so for 1919, and that, since the net income for 1919 was abnormal, its profits tax, if assessed by the ordinary method, would be found excessive compared with the tax assessed on other representative corporations.

The subpoena called for information concededly relevant to these contentions, and was properly issued if the Board of Tax Appeals had authority to make the inquiry. The Commissioner denies generally that any determinations made by him under §§ 327 and 328 may be appealed, and in any case objects that the appeal as to the year 1918 was not properly taken.

The appeal was authorized if at all by § 900 (e) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 337; U. S. C., Title 26, § 1216) under § 274 of that Act. Section 274 permits an appeal by the taxpayer only if " the Commissioner determines that there is a deficiency in respect of

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acted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

. . . . .

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

the tax" which has been returned. "Deficiency" is defined by § 273 as "(1) The amount by which the tax imposed . . . exceeds the amount shown as the tax by the taxpayer upon his return; . . . (2) If no amount is shown as the tax by the taxpayer on his return, . . . then the amount by which the tax exceeds the amounts previously assessed . . . as a deficiency. . . ."

It is argued that although there was a deficiency for 1918 and 1919, as considered together by the Commissioner, the years must be treated separately in determining whether a deficiency existed within the meaning of § 274, for purposes of appeal. So treated there was no deficiency in the year 1918, since the Commissioner had reduced the amount of the tax returned and paid for that year. This argument was rejected in *Appeal of E. J. Barry,* 1 B. T. A. 156, and the Commissioner appears formally to have announced his acquiescence in its rejection. Int. Rev. Cum. Bull. IV–2–1.

We think the question suggested is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. We were asked to grant certiorari only to pass upon the question whether the Commissioner's determinations under §§ 327 and 328 may be appealed to the Board of Tax Appeals. This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States,* 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government. Hence we do not pass upon this aspect of the case with respect either to the return or the amended return for 1918, and our decision is without prejudice to the disposition of the question wherever appropriately presented.

The Commissioner's objection that as to both years the Board of Tax Appeals is without authority to review his action is based not on any limitations to be found in the sections of the act defining the jurisdiction of the Board, but upon the peculiar provisions of §§ 327 and 328 themselves. These, it is argued, vest in the Commissioner the exercise of a judgment and discretion in their nature not subject to appellate review. It is pointed out that by § 327 assessments in the manner provided in § 328 are permitted "where the Commissioner is unable to determine" the invested capital of the taxpayer, or where "the Commissioner is unable satisfactorily to determine" the value of a mixed aggregate of tangible and intangible property paid in as capital, or where the Commissioner "finds and so declares of record that the tax if determined without benefit of this section" would, owing to abnormal conditions, work a hardship on the taxpayer. And it is urged that this phraseology, evidences an intention to make his decision final. The conclusion is said to be fortified by the confidential nature of the returns of taxpayers with which comparison must be made in order to make the assessment under § 328. Their privileged character is thought to preclude a construction of the appeal statute that would result in giving publicity to tax returns and confidential information so carefully guarded by other provisions of the revenue acts.

But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by §§ 327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We cannot assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his deci-

sions. An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. Not only is it required by § 900 (e) to hear and determine appeals taken under § 274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner. In the light of such provisions there is plainly no sufficient ground for reading into § 274, allowing an appeal wherever a deficiency is found by the Commissioner, an exception based on the supposedly sacrosanct character of his determinations under §§ 327 and 328.

But little weight can be given to the suggestion that the Board's appellate powers are limited by the section of the Act prohibiting the publication by collectors of information gained in the course of their duties. § 1018, reënacting § 3167 of the Revised Statutes (U. S. C., Title 18, § 216). The prohibition is limited to disclosures made "in any other manner than may be provided by law." It cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial or quasi-judicial proceeding, as has, indeed, been recognized by the Treasury Department itself in Treasury Decision No. 2962, directing that copies of returns may be furnished for the government's use as evidence in court. Neither the statute nor the practice of the Department suggests the existence of any governmental policy with respect to the use of the returns as evidence in any way inconsistent with the provisions of the statute authorizing the Board of Tax Appeals to hear appeals and conduct proceedings which are judicial in character.

As we do not pass upon the question whether the Board of Tax Appeals had jurisdiction of the appeal, except insofar as it is involved in our decision that the determinations of the Commissioner under §§ 327 and 328 are subject to review by the Board, the decree will be so modified as to be without prejudice to the petitioner's presenting in any appropriate manner to the Board or the Supreme Court of the District the questions whether the Board of Tax Appeals had in other respects jurisdiction of the appeal as to the tax for 1918 and, if not, to what extent the information called for by the subpoena is relevant and admissible upon the hearing of the appeal as to the tax for 1919.

Affirmed as modified.

TUCKER *v.* ALEXANDER, COLLECTOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 167. Argued October 7, 1927.—Decided November 21, 1927.

In a suit to recover a tax brought against a Collector after the plaintiff has filed a claim for refund, made prerequisite by Rev. Stats. § 3226, the objection that the ground of recovery relied on was not sufficiently specified in the claim as required by Treasury Regulations and the statute, is an objection that may be waived by stipulation of the parties. P. 230.

15 F. (2d) 356, reversed.

CERTIORARI, 273 U. S. 689, to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court against the petitioner in a suit to recover a tax from the respondent Collector.

Mr. Charles H. Garnett for petitioner.

Solicitor General Mitchell, with whom *Messrs. A. W. Gregg,* General Counsel, and *F. W. Dewart,* Special At-

torney, Bureau of Internal Revenue, were on the brief, for respondent, presented the case in deference to the views of the court below.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, from March 1, 1913, and in 1920, was the owner of shares of stock in a corporation which in the latter year was dissolved and liquidated. A distribution of some portion of its assets to the stockholders had been made in May, 1913. The Commissioner of Internal Revenue taxed as income on dissolution the difference between the value of the property received by petitioner as a liquidating dividend, and the value of his stock on March 1, 1913, less the value of the distribution of May, 1913, which was treated as a return of capital. Petitioner paid the tax under protest, setting up that it was excessive, and after filing a claim for refund brought the present suit in the district court for western Oklahoma to recover the excess. In his claim for refund petitioner assigned as reasons for it (1) the Commissioner's erroneous computation of the value of the stock on March 1, 1913, and (2) his failure to deduct from the capital and surplus of the company at the date of liquidation the amount of certain outstanding debts which were assumed by the stockholders, but no explicit statement was made that the Commissioner had erred in decreasing the March 1, 1913 value, by the value of the property distributed in May, 1913, nor was that point raised by the petition in the district court which in effect merely repeated the allegations of the claim for refund.

In the course of the trial, petitioner, without objection by the government, abandoned the grounds of recovery stated in the petition and attacked only the Commissioner's deduction of the return of capital from the March 1, 1913 value. That issue alone was litigated. At the close of the trial counsel stipulated that, if the court

found the deduction to have been erroneously made, the petitioner should have judgment in a sum named. The district court's judgment against petitioner was affirmed by the court of appeals for the eighth circuit, 15 Fed. (2d) 356, which held that a recovery on grounds different from those set up in the claim for refund was precluded by § 3226 of the Revised Statutes, as amended by § 1014 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343; U. S. C., Title 26, § 156). The case was brought here on certiorari to review this determination. 273 U. S. 689.

Section 3226 provides that "No suit or proceeding shall be maintained . . . for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; . . ." And article 1036 of Treasury Regulations No. 45 (1920 ed.), in force when the claim for refund was filed, requires that such claims "shall be made on Form 46 (revised)," and that "all the facts relied upon in support of the claim shall be clearly set forth under oath." In the form referred to a space was provided for the claimant to set out the reasons why his application should be allowed.

In our view of the case, the question considered by the circuit court of appeals was not properly before it, and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.

If the Collector and counsel for the government had power to waive an objection to the sufficiency of the de-

scription of the claim filed, it was waived here, and we need not consider the precise extent of the requirements prescribed by statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The Solicitor General does not urge that the government's possible objection could not be waived but submits the question for our decision.

Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 353, 354; *Nichols* v. *United States,* 7 Wall. 122, 130. But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of

limitations. *Finn* v. *United States,* 123 U. S. 227. Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here.

Reversed.

HEINER, COLLECTOR, *v.* COLONIAL TRUST COMPANY, EXECUTOR.

LEWELLYN, FORMER COLLECTOR, *v.* COLONIAL TRUST COMPANY, EXECUTOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 219, 220. Argued October 7, 1927.—Decided November 21, 1927.

The net income derived by a non-Indian from a lease made to him by a tribe of Indians with the approval of the Secretary of the Interior, is taxable under the Revenue Acts of 1916 and following years. P. 234.

17 F. (2d) 36, reversed.

CERTIORARI, 274 U. S. 731, to judgments of the Circuit Court of Appeals which affirmed judgments of the District Court, 12 F. (2d) 481, in favor of the respondent trust company in suits to recover income taxes collected from the respondent's testator.

Solicitor General Mitchell, with whom *Assistant Attorney General Willebrandt* and *Messrs. A. W. Gregg,* General Counsel, and *A. J. Ward,* Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioners.

Mr. John W. Davis, with whom *Messrs. R. C. Allen, C. A. Jones, M. W. Acheson, Jr., James R. Sterrett,* and *I. J. Underwood* were on the brief, for respondent.

Messrs. James M. Beck and *T. J. Leahy* filed a brief as *amici curiae,* by special leave of Court.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent's decedent procured an oil lease from the Tribal Council of the Osage Tribe of Indians covering land of the Tribe in Oklahoma. The lease was in the form prescribed by the Secretary of the Interior and was approved by him. The lessor reserved as royalties an agreed percentage of the gross proceeds from the sale of the oil produced, to be paid to the Superintendent of the Osage Indian Agency. On the net income derived by decedent from the sale of the oil between 1917 and 1921 there were assessed and collected income taxes aggregating more than $800,000. Respondent brought these suits in the district court for western Pennsylvania to recover the tax paid, on the theory that, as the interests of the Indians were concerned, Congress had not intended by the various revenue acts to tax the income derived from the exploitation of their lands by non-Indian lessees, and that it was thus impliedly exempt from the tax. Judgments of the district court for respondent [12 Fed. (2d) 481] were affirmed by the court of appeals for the third circuit [17 Fed. (2d) 36] and the cases are here on certiorari, the parties having stipulated that No. 220 shall abide the result in No. 219.

Section 1 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756) provides:

"That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax . . ." at specified rates.

Section 2 (a) of the Revenue Act of 1916, as amended by the Act of 1917, (c. 63, 40 Stat. 300, 329) provides:

"That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains . . . growing out of the . . . use of or interest in real or personal property,

. . . also [gains] from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The pertinent sections of the later revenue acts during the period do not differ materially from those quoted from the 1916 Act. Act of February 24, 1919, c. 18, §§ 210, 213, 40 Stat. 1057, 1062, 1065; Act of November 23, 1921, c. 136, §§ 210, 213, 42 Stat. 227, 233, 237.

These statutes in terms plainly embrace the income of a non-Indian lessee derived from the lease of restricted Indian lands. But we are reminded by respondent that both the lease here involved and the income it brings the lessee are beyond the taxing power of the states, for the lease is merely the instrument which the government has chosen to use in fulfilling its task of developing to the fullest the lands and resources of its wards, and a state may not by taxation lessen the attractiveness of leases for such a purpose, *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522; and see *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; and reliance is placed on those cases indicating that general acts of Congress are not applicable to the Indians where to apply them would affect the Indians adversely. *Washington* v. *Miller,* 235 U. S. 422, 427, 428; *Elk* v. *Wilkins,* 112 U. S. 94, 100. The conclusion then urged on us is that Congress cannot be held to have intended by the general provisions of the revenue acts to tax the incomes of the Indians themselves; nor by taxing that of their lessees to do itself what the states are forbidden to do.

The power of the United States to tax the income is undoubted. It seems to us extravagant, in the face of the comprehensive language of the statute, to infer that Congress did not intend to exercise that power merely

because, in the absence of congressional consent, it is one withheld from the states or because the tax in terms imposed on others may have some economic effect upon the Indians themselves. The disposition of Congress has been to extend the income tax as far as it can to all species of income, despite immunity from state taxation. During the period now in question the compensation of many federal officials was subject to federal income tax, and income from government bonds was taxed except when expressly exempted.

Assuming that the Indians are not subject to the income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealing with the Indians. Tax exemptions are never lightly to be inferred, *Vicksburg, etc., R. R.* v. *Dennis,* 116 U. S. 665, 668; *Philadelphia & Wilmington R. R.* v. *Maryland,* 10 How. 376, 393, and we think any implication of an exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons merely because the statute, if applied as written, may have some perceptible economic effect on the Indians.

It is not without weight that the Treasury Department from the beginning has consistently collected income tax from lessees of Indian oil lands running into vast amounts. If this was contrary to the intention of Congress it is reasonable to suppose that this practice of the Department would have been specifically corrected in some of the revisions of the laws taxing income in 1917, 1919, 1921, 1924 or 1926. Compare *National Lead Co.* v. *United States,* 252 U. S. 140, 145, 146.

Reversed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* ELLZEY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 63. Argued October 24, 25, 1927.—Decided November 21, 1927.

1. By the doctrine of the last clear chance a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril, had in fact a later opportunity than the plaintiff to avert an accident. But where as a result of the negligent operation of a railway motor car by defendant's agent, with plaintiff's acquiescence or encouragement, the car was derailed and plaintiff injured, their courses of conduct were not so independent that either one or the other could be said to have had in fact a later opportunity to avoid the consequences of their joint negligence, and the doctrine was therefore inapplicable. P. 241.
2. Instructions in such a case *held* sufficiently favorable to the plaintiff on the subject of contributory negligence. P. 242.

12 F. (2d) 4, reversed.

CERTIORARI, 271 U. S. 659, to a judgment of the Circuit Court of Appeals which reversed a judgment entered on a verdict in the District Court in favor of the Railway Company in an action for personal injuries brought against it by Ellzey. The jurisdiction of the District Court was based on diversity of citizenship.

Mr. Frank H. Moore, with whom *Messrs. A. F. Smith, John D. Wilkinson, C. Huffman Lewis, W. Scott Wilkinson* and *S. W. Moore* were on the brief, for petitioner.

If Merchant was negligent, and plaintiff directed or acquiesced in that negligence, he was also negligent and assumed the risk of injury from the negligent conduct in which he participated. *Harding* v. *Jesse,* 189 Wis. 652; *Henderson* v. *Penna., etc. Co.,* 179 Fed. 577; *Davis* v. *Chicago, etc. Co.,* 159 Fed. 18; *Bradley* v. *Mo. Pac. R. Co.,* 288 Fed. 484; *Sou. Ry. Co.* v. *Priester,* 289 Fed. 945; *Engstrom, Adm'r.* v. *Canadian etc. Ry. Co.,* 291 Fed 736.

If it were possible that in such circumstances negligence of Merchant might be a proximate cause, and plaintiff's negligence a remote cause, then the question of whether or not plaintiff's negligence was a proximate cause would be one for the jury; and the charge clearly and repeatedly pointed out to the jury that the plaintiff's negligence must be a proximate cause of the accident to bar his recovery.

There was no warrant for an instruction based upon the last clear chance doctrine. *St. L. & S. F. Ry* v. *Schumacher,* 152 U. S. 77; *Wheelock* v. *Clay,* 13 F. (2d) 972; *Chunn* v. *City etc. Ry.,* 207 U. S. 302; *St. L. & S. F. R. Co.* v. *Summers,* 173 Fed. 359; *Va. Ry. & Power Co.* v. *Leland,* 143 Va. 920; *Kinney* v. *Chicago etc. R. Co.,* 17 F. (2d) 708; *Gilbert* v. *Erie R. Co.,* 97 Fed. 747; *Penna. R. Co.* v. *Swartzel,* 17 F. (2d) 869; *Allnutt* v. *Mo. Pac. R. Co.,* 8 F. (2d) 604; *Robbins* v. *Penna. Co.,* 245 Fed. 435; *Reaver* v. *Walch,* 3 F. (2d) 204; *Hammers* v. *Colo. Sou. Ry. Co.,* 128 La. 648. See also *Harrison* v. *Ry. Co.,* 132 La. 761; *Callery* v. *Ry. Co.,* 139 La. 763; and *Castile* v. *O'Keefe,* 138 La. 479; *Weisshaar* v. *Kimball S. S. Co.,* 128 Fed. 397.

Plaintiff's status as passenger, or otherwise, was properly left to the jury. Even if a passenger, his contributory negligence would bar his right of recovery. *Elder Dempster Co.* v. *Poupirt,* 125 Fed. 732; *Ingalls* v. *Bills,* 9 Metc. (Mass.) 7; *Mendelson* v. *Davis,* 281 Fed. 18; *John J. Radel Co.* v. *Borches,* 147 Ky. 506; *Monongahela River etc. Co.* v. *Schinnerer,* 196 Fed. 375; *Winston's Adm'r* v. *City of Henderson,* 179 Ky. 220; *Webber* v. *Billings,* 184 Mich. 119; See also *Jefson* v. *Crosstown St. Ry. Co.,* 129 N. Y. Supp. 233; 10 C. J. 1096–1097; *DeHoney* v. *Harding,* 300 Fed. 696; *Union Traction Co.* v. *Sullivan,* 38 Ind. App. 513; *United R. & E. Co.* v. *Riley,* 109 Md. 327.

Mr. S. P. Jones, with whom *Mr. O. W. Bullock* was on the brief, for respondent.

Ellzey was a passenger for hire on the car. See *Drovers Pass* cases: *I. & St. L. Ry.* v. *Horst,* 93 U. S. 291; *Phila. & Reading Ry.* v. *Derby,* 14 How. 486; *N. Y. Cent. Ry.* v. *Lockwood,* 17 Wall. 357; *Norfolk Sou. Ry.* v. *Chatman,* 244 U. S. 276. The operator of a carriage can not by heeding the urge of the passenger place the burden of contributory negligence upon him. The passenger is presumed not to have equal information with the carrier, either as to the safety of the conveyance or the speed it is capable of making with safety. *Weishaar* v. *S. S. Co.,* 128 Fed. 397; *Lynn* v. *Sou. Pac. Co.,* 24 L. R. A. 710; Hutchinson, Carriers, 2d. ed., § 654 c; *Little* v. *Hasket,* 116 U. S. 371. The right to make a direct contract against negligence being denied by law, there can be no implied contract relieving the carrier by attempting to class it as contributory negligence growing out of the passenger's suggestion of fast driving. If Ellzey was guilty of contributory negligence in urging fast running, Merchant knew it, and it was his duty to protect Ellzey against his own negligence. 10 C. J., § 1490, p. 1107; *Inland Co.* v. *Tolson,* 139 U. S. 558; *Penna R. R.* v. *Reed,* 60 Fed. 694; *Norfolk Term. Co.* v. *Rotolo,* 191 Fed. 4.

Even if the plaintiff could have been guilty of negligence in the encouragement of the speed, he certainly could not relieve the carrier by passively failing to protest. If any such theory as passive contributory negligence could apply to a passenger, it would have to appear that he knew and appreciated the danger, (and not that a person of ordinary care would have known and appreciated the danger), had an opportunity to avoid its consequences, and failed to do so. The doctrine of imputed negligence applies to injuries inflicted by third persons and not to injuries inflicted by the carrier. It is the duty

of the carrier to protect the passenger against his own negligence instead of acquiescing in his negligence to his injury. Hutchinson, Carriers, 2d ed., § 654 c; *Weishaar* v. *Kimball Co.*, 128 Fed., 397, certiorari denied, 194 U. S. 638; *Lynn* v. *Sou. Pac. Co.*, 24 L. R. A. 710. If Ellzey had been guilty of contributory negligence in urging Merchant to drive the car to Leesville, or in urging him to increase the speed, the subsequent negligence of the defendant in running the car at a high rate of speed was the proximate cause of the injury. 6 Cyc. 641; *Rodley* v. *London Ry.*, 1 App. Cas. 754, 46 L. J. Exch. 573; 35 L. T. Rep. (N. S.) 637; *Chunn* v. *Washington Ry.*, 207 U. S. 302; *Inland Co.* v. *Tolson*, 139 U. S. 558; *Norfolk Term. Co.* v. *Rotolo*, 112 C. C. A. 585; 192 Fed. 4.

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a United States deputy marshal, was assigned to guard Merchant, a telegraph lineman employed by petitioner, from violence by strikers. He went with Merchant to repair a telegraph line and while returning with him on a motor car over petitioner's railroad the car was derailed and respondent injured. Respondent brought the present suit in the district court for western Louisiana to recover for his injuries. The trial by jury resulted in a verdict and judgment for the defendant, the petitioner here. The court of appeals for the fifth circuit, 12 Fed. (2d) 4, reversed the judgment, holding that an instruction to the jury by the trial judge was erroneous.

There was evidence from which the jury could have found that the accident and injury were caused by the negligent operation of the motor car by Merchant at a dangerously high rate of speed. There was also evidence from which it might have found that respondent contributed to his own injury either by urging Merchant to drive at excessive speed or by failing to object to Merchant's

obvious negligence. That part of the charge designated by the court below as erroneous is as follows:

"If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running [of] the car was injured, then that would be contributory negligence which would bar his recovery; or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury and would in law constitute contributory negligence."

The court of appeals, in holding this instruction improper, pointed out portions of the evidence indicating that respondent's conversations with Merchant, relied on to show that he urged or advised Merchant to drive the motor car at a dangerous rate of speed, took place at Carson and later at De Ridder, on petitioner's line, and that the accident occurred after leaving De Ridder and while proceeding north from that point to Leesville. It pointed out also that under the quoted instruction the respondent could not have recovered if the jury found that he had voluntarily remained on the car after he saw it was being negligently run. The court considered this erroneous, saying:

"Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury, and plaintiff's negligence be deemed a remote cause. *Chunn* v. *City &*

Suburban Ry., 207 U. S. 302 . . . . The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it."

This language suggests that the circuit court of appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the *Chunn* case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a later opportunity than the plaintiff to avert an accident. *Grand Trunk Ry.* v. *Ives*, 144 U. S. 408, 428; *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558. In the cases applying the rule the parties have been engaged in independent courses of negligent conduct. The classic instance is that in which the plaintiff had improvidently left his animal tied in a roadway where it was injured by the defendant's negligent operation of his vehicle. *Davis* v. *Mann*, 10 M. & W. 546. It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later.

On the facts assumed by the circuit court of appeals—that Merchant was driving the car recklessly with respondent's encouragement or acquiescence—the respondent and Merchant were engaged in a common venture which, acting together, they were carrying on in a careless manner. In such a case their courses of conduct are not sufficiently independent to let it be said that either one or the other had in fact a later opportunity to avoid the consequences of their joint negligence. Compare *St. Louis & San Francisco Ry.* v. *Schumacher*, 152 U. S. 77; *Wheelock* v. *Clay*, 13 Fed. (2d) 972; *Kinney* v. *Chicago, Great Western R. R.*, 17 Fed. (2d) 708; *Denver City Tramway Co.* v. *Cobb*, 164 Fed. 41.

We think that the doctrine of the last clear chance was not involved here. If the jury found negligence on the

part of the defendant, then their verdict turned on whether they thought the respondent was guilty of contributory negligence. Whether the instructions were sufficient in this respect is the only substantial question before us. The trial judge charged generally, in various forms, that respondent's negligence, as a bar to recovery, must be found to have contributed "proximately" to the injury, and that if respondent counseled Merchant to run the car at a reckless rate of speed, and by reason of his encouragement Merchant negligently operated the car, and as a result of that negligent operation the injury occurred, "or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." Again the jury was instructed that respondent "would not be held to have assumed the risk of an injury resulting from the defendant's negligence merely because the plaintiff failed to interpose his judgment against that of the defendant, unless you find that a man of ordinary care and prudence, so situated, would have abandoned the car."

We think these instructions and others of similar import, read as we must read them in the light of the whole charge, were sufficiently favorable to the respondent on the subject of contributory negligence. Perhaps it would have been permissible to tell the jury that, though respondent had at an earlier moment encouraged or acquiesced in Merchant's recklessness, he might still recover if later and before the accident he repented and asked Merchant to drive carefully. But the court's failure to do so, in the absence of a specific request, seems to us not to be ground for reversal.

The respondent suggests here numerous other objections to the charge as given. We have considered them and find that they present no substantial question requiring further comment. The judgment of the district court is affirmed and that of the court of appeals is

Reversed.

LEWELLYN, COLLECTOR, *v.* ELECTRIC REDUCTION COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 71. Argued October 26, 1927.—Decided November 21, 1927.

1. The rights of a buyer who has prepaid a seller for merchandise which the latter has failed to deliver are upon contract and are not a "debt" where neither party has abandoned the contract; the prepayment is therefore not deductible, in arriving at net income under Revenue Act of 1918, § 234 (5), as a "debt ascertained to be worthless and charged off within the taxable year." P. 246.
2. When the seller proved to be irresponsible, the buyer's loss could be deducted under § 234 (4) as a "loss sustained during the taxable year," i. e., the year in which his claim proved to be worthless. P. 246.
3. Plaintiff, in 1918, paid in advance for goods which were never delivered. He did not charge off the amount in that year on his books, but continued to carry it in a "bills receivable" account. The worthlessness of the claim was proved by the outcome of litigation two years after the payment. He then sought, under Subsection (4), § 234, Revenue Act of 1918, to deduct the amount of the payment in an amended tax return for 1918. *Held*, that the deduction was not allowable because the loss was not "sustained" during that taxable year. P. 247.
4. Trial by jury having been waived in writing, review of this case is limited to the sufficiency of the facts specially found to support the judgment and to the rulings excepted to and presented by the bill of exceptions, Rev. Stat. §§ 649, 700. The Court is without power to grant a new trial except for error thus presented. P. 248.

11 F. (2d) 493, reversed.

CERTIORARI, 273 U. S. 676, to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court for the Collector in an action brought by the Reduction Company to recover income taxes. 8 F. (2d) 91.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell*, *Assistant Attorney General Willebrandt*, and *Messrs. Clarence M. Charest*, General Counsel, and *Irwin R. Blaisdell*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. S. Leo Ruslander, with whom *Mr. George R. Beneman* was on the brief, for respondent.

Mr. Donald Horne, filed a brief as *amicus curiæ*, by special leave of Court.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on writ of certiorari to the Circuit Court of Appeals for the third circuit, to review its judgment, 11 Fed. (2d) 493, reversing the judgment of the district court for western Pennsylvania, 8 Fed. (2d) 91, and awarding a new trial. The action was brought by respondent to recover income taxes paid by it for the year 1918. By written stipulation a jury was waived and the case was tried to the court, which made special findings and on them gave judgment for defendant. The principal question to be determined is the right of the respondent, upheld below, to deduct an admitted business loss from its gross income for 1918 in determining its tax for that year, rather than from gross income for a later year.

In July, 1918, respondent contracted with one Jouravleff for the sale and delivery to it in monthly installments of a quantity of tungsten ore. The contract required the buyer immediately to accept a bill of exchange drawn on

it by the seller in the sum of $30,000, which was to be applied against the purchase price of the first carload of ore shipped. Respondent accepted the draft and the seller negotiated it through bankers associated with him in the transaction. Respondent paid it at maturity, in advance of any actual shipment of ore, having received from the broker who had negotiated the sale, a telegram saying: "Shipment one car will be made today." Only a small quantity of ore was ever shipped. This was received in the following December and after being credited upon the amount of the draft left a balance of more than $27,000. In March of the following year respondent began three separate suits to recover the $27,000—one against the seller, the second against the broker as an alleged surety or guarantor of the seller, and the third against the bankers. Judgment secured against the seller in 1919 remains unsatisfied. The suit against the broker resulted in a judgment for the defendant in November, 1922. The suit against the bankers was discontinued in 1921 as useless after they had been adjudged bankrupt. Respondent did not charge off the $27,000 on its books in 1918, but continued to carry it as an item in its "bills receivable" account. It claimed no loss on account of the payment in its tax return for that year. Upon the termination of the litigation in 1922 it filed an amended tax return for 1918, deducting the uncollected balance as a loss, and brought the present suit to recover the alleged overpayment of tax.

Section 234 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1078, provides that in arriving at taxable income there may be deducted:

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

"(5) Debts ascertained to be worthless and charged off within the taxable year."

The district court held that the loss was upon a worthless debt deductible under subdivision (5) and not deductible for 1918 because not charged off in that year.

The respondent contends and the court below held that the loss was not one upon a worthless debt, deductible under sub-section (5), but was deductible when "sustained" under sub-section (4), and concludes that the loss was rightly deducted as of 1918 since the loss was sustained when respondent paid out the money for which it received no return.

We assume without deciding, as was assumed by both courts below, that sub-section (4) and sub-section (5) are mutually exclusive so that a loss deductible under one may not be deducted under the other. We may assume also that upon the abandonment of the contract by the seller the buyer might have maintained an action to recover the balance of the money which he had paid. But so far as appears from the record there had been no abandonment by the seller in 1918. Throughout that period the buyer was calling for deliveries and some were made as late as in December. The buyer's rights were upon a contract for the delivery of merchandise and were not a "debt" in either a technical or a colloquial sense. We conclude that if respondent's contract rights became worthless in 1918 he was not required to deduct his loss as a worthless debt under sub-section (5), but was entitled to deduct it under sub-section (4) as a loss sustained in that year.

But we do not think that a loss resulting from a buyer's prepayment to a seller who proves to be irresponsible is necessarily sustained, in the statutory meaning, as soon as the money is paid. The statute was intended to apply not only to losses resulting from the physical destruction of articles of value but to those occurring in the operations of trade and business, where the business man has ven-

tured on a course of action in the reasonable expectation that the promised conduct of another will come to pass. Not only the future success of the business but its present solvency depends on the probable accuracy of his prophecy. Only when events prove the prophecy to have been false can it be said that he has suffered. His case is not like that of a man who fails to learn of the theft of his bonds or the burning of his house until a year after the occurrence; but rather resembles the position of a merchant who buys in one year, for sale in the next, merchandise which shifting fashion renders unsaleable in the latter. It may well be that he whose house has been burned has sustained a loss whether he knows it or not and may recover a tax paid in ignorance of that material fact. But we cannot say that the merchant whose action has been based not merely on ignorance of a fact but on faith in a prophecy—even though the prophecy is made without full knowledge of the facts—can claim to have sustained a loss before the future fails to justify his hopes.

Here the only fact relied upon to show a loss is the outcome of the litigations two years after respondent's payment to Jouravleff. There is nothing in the findings from which we could conclude that the respondent in 1918 had ceased to regard his rights under the contract as having value or that there was then reasonable ground to suppose that efforts to enforce them would be fruitless. On the findings respondent is not entitled to recover.

At the trial respondent offered evidence that it had conducted, in 1918, an investigation which tended to show the irresponsibility of Jouravleff. Inquiries, variously phrased, to elicit this fact were excluded by the trial judge both because they were irrelevant and because the evidence offered was inadmissible as hearsay. An examination of the bill of exceptions discloses that the proffered testimony was rightly excluded on this latter ground.

Hence no error was committed by the trial court in its rulings. A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the facts specially found to support the judgment, and to the rulings excepted to and presented by the bill of exceptions, Rev. Stat. §§ 649, 700; *Fleischmann Co.* v. *United States,* 270 U. S. 349, and we are without power to grant a new trial except for error thus presented. *Mueller Grain Co.* v. *American State Bank, post,* p. 493, reversing 15 Fed. (2d) 899. The judgment of the district court was right, for reasons other than those assigned by it. It is affirmed and the judgment of the court of appeals is

Reversed.

EQUITABLE TRUST COMPANY, TRUSTEE, *v.* ROCHLING ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 34. Argued October 14, 17, 1927.—Decided November 21, 1927.

1. Where a bank before the filing of a petition in bankruptcy against it, received deposits of checks, the proceeds of which were later collected by its trustee in bankruptcy, the depositor is entitled to claim the proceeds of the deposit only if the bank received the checks as an agent for collection, but must stand as an ordinary creditor if ownership of the paper passed to the bank. P. 252.
2. Respondents, who were bankers of Frankfort-on-Main, desired in the course of their international business, to arrange a credit at New York. Pursuant to instructions issued at their request by London connections, New York banks delivered to a New York banking firm (afterwards bankrupt) their cashier's checks drawn payable to the order of that firm "for account of" respondents. On the same day, the firm, in following a course of dealing previously established with respondents, credited the checks to respondents' account, made book entries indicating that respondents were entitled to interest on the amount from that date, and deposited them to its own credit in other banks. Before collection of the checks, the petition in bankruptcy was filed. *Held*—That the

words "for account of" were not necessarily to be taken as constituting the payee an agent for collection, but were to be construed in the light of the intention of the parties as revealed by all the circumstances, and in this instance their purpose was to advise the bankrupt of the account to which the checks were to be credited, and not make it an agent for collection, or restrict its rights as purchaser. P. 253.

10 F. (2d) 935, reversed.

CERTIORARI, 271 U. S. 653, to a judgment of the Circuit Court of Appeals, which reversed an order of the District Court dismissing a petition of the respondents for reclamation of the proceeds of checks collected by the above named trustee in bankruptcy.

Mr. Godfrey Goldmark, with whom *Messrs. George G. Ernst* and *Ralph F. Colin* were on the brief, for petitioner.

Mr. Henry G. Hotchkiss, with whom *Mr. William H. White, Jr.,* was on the brief, for respondents.

Early English authorities decided that the words "for account of" were restrictive. *Truettel* v. *Barandon,* 8 Taunt. 100; *Coxe* v. *Harden,* 4 East 211; *Lloyd* v. *Sigourney,* 5 Bing. 525.

The modern English rule is the same in cases of "crossed cheques." The Laws of England, by Lord Halsbury, Vol. 1, p. 569; Vol. 2, p. 480; Morse on Banks and Banking, 6th Ed., § 245.

Early American federal and state cases follow the English rule. *Lee* v. *Chillicothe Bank,* 15 Fed. Cas. 151; *Leary* v. *Blanchard,* 48 Me. 269; *Blaine* v. *Bourne,* 11 R. I. 119.

The words "for account of" held to be restrictive. *White* v. *Miner's Nat'l Bank,* 102 U. S. 658. Followed in *Commercial Nat'l Bank* v. *Armstrong,* 148 U. S. 50; *Old Nat'l Bank of Evansville* v. *German American Nat'l Bank of Peoria,* 155 U. S. 556; *The Nyssa-Arcadia Drainage Dist.* v. *The First Nat'l Bank,* 3 F. (2d) 648.

The legal restrictive effect of the words "for account of" and "for collection" is identical. *Old Nat'l Bank of Evansville* v. *Bank, supra; The Nyssa-Arcadia Drainage Dist.* v. *Bank, supra; Bank of Metropolis* v. *First Nat'l Bank of Jersey City,* 19 Fed. 301.

The restrictive effect of the words "for collection" is recognized in practice by the New York Clearing House. Paton's Digest of Legal Opinions and Banking Law, § 2747.

The words "for account of" are restrictive within the definition of the Negotiable Instruments Law of New York.

The effect of the restrictive wording was to prevent Knauth, Nachod & Kuhne from obtaining title to the checks or their proceeds.

The words "Through the New York Clearing House" and "Payable Only Through the New York Clearing House" are also restrictive.

Nothing in the dealings of the parties nor in the circumstances surrounding the case in any way changes the legal effect of the wording appearing on the checks.

Lloyd's Bank and The Swiss Bank were liable to respondents for any delay in payments that might arise.

The reversal of the entries in the case of the Speyer check indicates the equivocal nature of the credit of the check and entries for interest.

The crediting of the checks does not affect the restrictive quality of the words appearing thereon. *Nat'l B. & D. Bank* v. *Hubbell,* 117 N. Y. 384; *In re Jarmulowsky,* 249 Fed. 319; *Beal* v. *City of Somerville,* 50 Fed. 647.

The entries relating to interest are equally insufficient to change the legal consequences of the wording on the face of the checks. *Fifth Nat'l Bank* v. *Armstrong,* 40 Fed. 46; Morse on Banks and Banking, 6th Ed. § 658 (c).

The facts in the present case bring it within the authority of *White* v. *The Bank, supra,* and not within the purview of *Burton* v. *U. S.,* 196 U. S. 283.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondents, bankers of Frankfort-on-Main, maintained a general deposit account with the bankrupts, who were private bankers in New York City. On instruction of Lloyds Bank, Ltd., London, which was requested by respondents "to procure this amount for us" on June 15, 1923, "at Knauth, Nachod & Kuhne, New York," the National Bank of Commerce in New York on that day delivered to Knauth, Nachod & Kuhne, the bankrupts, its cashier's check for $30,000 payable to their order "for account of Rochling Bank, Gebt. Frankfort-on-Main," and took from them their receipt for the check "for account of Rochling Bank." On instruction of the Swiss Bank, London, the National City Bank, New York, on the same date delivered its cashier's check for $30,000, payable to the order of Knauth, Nachod & Kuhne, "A/C Gebr. Rochling, Frankfort A/M," taking from them a receipt in like form. On that day, too, the bankrupts credited the account of respondents with the two checks and made an entry on their books indicating that respondents were entitled to interest on the amount of the checks from that date. The checks were deposited by Knauth, Nachod & Kuhne in their own deposit accounts in other banks and were there credited to those accounts. On the following day, June 16, 1923, before the collection of the checks, the petition in bankruptcy was filed.

In receiving these checks, forthwith crediting respondents with them, and in crediting interest from the date of their receipt, the bankrupts followed the established course of their business with respondent which had extended over a period of more than two years. Periodic statements of the account rendered to respondents showed that interest was credited from the day of deposit, and that on occasion drafts were made against deposits before they had been collected.

Respondents' petition, filed in the district court for southern New York, for reclamation of the proceeds of the checks, was dismissed. The order of the district court was reversed by the circuit court of appeals for the second circuit, 10 Fed. (2d) 935. This Court granted certiorari. 271 U. S. 653.

The proceeds of the two checks concededly have come into the hands of the petitioner, the bankrupts' trustee, and the sole question presented is whether the bankrupts, on receipt of the checks and before the filing of the petition in bankruptcy, became the owners of them, or whether, as the court of appeals held, Knauth, Nachod & Kuhne were respondents' agents to collect them. If the former, respondents were creditors of the bankrupts, *Douglas* v. *Federal Reserve Bank,* 271 U. S. 489; *Burton* v. *United States,* 196 U. S. 283, entitled to share only on an equal footing with other creditors. If the latter, respondents were entitled to reclamation from the petitioner since the checks had not been collected at the time of the petition in bankruptcy. *St. Louis & San Francisco Ry.* v. *Johnston,* 133 U. S. 566; *White* v. *Stump,* 266 U. S. 310, 313; Bankruptcy Act, § 70 (a), c. 541, 30 Stat. 544, 565, as amended, § 16, c. 487, 32 Stat. 797, 800.

Ordinarily, where paper is indorsed without restriction by a depositor and is at once placed to his credit by the bank, the inference is that the bank has become the purchaser of the paper and in making the collection is not acting as the agent of the depositor. *Douglas* v. *Federal Reserve Bank, supra; Burton* v. *United States, supra; In re Jarmulowsky,* 249 Fed. 319, 321. But the court below thought, and respondents argue here, that the form of the check directing payment to be made to the bankrupts "for account of" the respondents operated to make them agents to collect the paper. The point is made that this is the effect of these or equivalent words where the payee of negotiable paper indorses it "for

account of" the indorser. It may be conceded that such an indorsement indicates that the transaction is not a purchase and sale of the paper and, at least when not otherwise explained or limited, may fairly be taken to mean that the interest gained by the indorsee is that of an agent for collection. *White* v. *National Bank*, 102 U. S. 658; *Evansville Bank* v. *German-American Bank*, 155 U. S. 556; *Commercial Bank of Penn.* v. *Armstrong*, 148 U. S. 50, 57.

Here, however, the words were used not by a payee in his indorsement, but by a third person making a deposit for respondents' benefit. They are thus of much less significance than in the usual case as data in determining the relation between respondents and the bankrupts, and the course of conduct of the parties becomes correspondingly more important. Moreover, the words themselves, despite their wide commercial use and the importance of giving them, as far as practicable, a uniform effect, have no rigid and unchangeable significance. Their purpose is to express intention. They are not an incantation which unfailingly invokes an agency. And the circumstances in this case indicate that they were here used with a different object.

The dominant purpose of the entire transaction, as far as respondents were concerned, was to arrange that a credit with the bankrupts should be available on June 15, and this they accomplished as soon as the checks were delivered to the bankrupts. While we need not stress the point, the added facts that respondents were international bankers requiring the credit, in the course of their business, and that the credit was effected by the deposit of cashier's checks, which pass among bankers as current funds, are not without their significance. Nothing in the previous course of dealing or in the actions of respondents indicates that they int nded or had any reason for intending that Knauth, Nachod & Kuhne should take the paper

as their agents for collection, or that any restriction should be placed on the use of the checks by Knauth, Nachod & Kuhne once they had credited respondents.

Nor was there anything in the relationship to the transaction of the New York banks whose checks established the credit to suggest any reason or purpose so to restrict it. The duty of these banks was performed and their interest in the paper, apart from their liability to pay it, ceased as soon as they had delivered it to the bankrupts. But it was indispensable to the completion of the transaction that the bankrupts should be advised to what account the checks were to be credited. And it was apparently the function of the words in question to tell them. That alone, we think, was their purpose. To assign them any other would be to ignore the course of business followed here and banking usage in general, and to give them a strained and unnatural construction. We think the district court was right, and the judgment of the court of appeals is

Reversed.

LATZKO ET AL. *v.* EQUITABLE TRUST COMPANY, TRUSTEE.

EQUITABLE TRUST COMPANY, TRUSTEE, *v.* LATZKO ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 48 and 49. Argued October 19, 1927.—Decided November 21, 1927.

Claimants, who were bankers of Budapest, desiring to procure credit with a New York banking firm (the bankrupts herein) with which they had a checking account, procured to be deposited with it (1), a cashier's check of a New York bank payable to the bankrupt's order, "favor" of claimants, and (2), a check of another New York banker drawn on its account with the bankrupt and payable to the

bankrupt's order accompanied by a letter stating that it was "for account of" the claimants. The bankrupts immediately credited both checks to the claimants, but they were not collected until after the bankruptcy petition had been filed on the following day.

Held, following *Equitable Trust Co.* v. *Rochling, ante,* p. 248, that the effect of the words "favor" and "for account of" was not to make the bankrupts agents for collection, but was to indicate the account to be credited; that ownership of the checks passed to the bankrupts, and that claimants were only general creditors. P. 256.

10 F. (2d) 935, reversed in part and affirmed in part.

CERTIORARI, 271 U. S. 654, to a judgment of the Circuit Court of Appeals, which affirmed in part and reversed in part, a judgment of the District Court dismissing a petition for reclamation of funds traced into the hands of a trustee in bankruptcy.

Mr. Charles A. Brodek, with whom *Mr. Borris M. Komar* was on the brief, for Latzko et al.

Mr. Godfrey Goldmark, with whom *Messrs. George G. Ernst* and *Ralph F. Colin* were on the brief, for The Equitable Trust Company.

MR. JUSTICE STONE delivered the opinion of the Court.

This case, here on petition and cross-petition for certiorari to review a judgment of the circuit court of appeals, involves the same bankruptcy and questions similar to those considered in No. 34, *Equitable Trust Company of New York* v. *Rochling, ante,* p. 248. Petitioners in No. 48, respondents in No. 49, later referred to as "claimants," are bankers of Budapest who had a checking account with Knauth, Nachod & Kuhne, the bankrupts. On June 15, 1923, they procured a credit with the bankrupts through the deposit with the latter by the National City Bank of New York of its cashier's check, payable to the bankrupts' order, "favor N. Latzko & A. Popper, Budapest." On the same day Goldman Sachs

& Co., bankers in New York, delivered to the bankrupts their check, drawn on the Bank of America in New York, and payable to the bankrupts' order, accompanied by a letter stating that the check was "for account of Latzkopper, Budapest." The bankrupts immediately credited both checks to the claimants, but they were not collected until after the bankruptcy petition had been filed on the following day. The proceeds of collection are traced into the hands of the trustee in bankruptcy and the present proceedings were brought for their reclamation in the district court for southern New York. The petition was dismissed. The court of appeals for the second circuit reversed the order of the district court as to the National City Bank check and affirmed it as to that of Goldman, Sachs & Co. *In re Gubelman,* 10 Fed. (2d) 926, holding that the words in the former, "favor N. Latzko and A. Popper, Budapest," appearing on the face of the check, were restrictive and made the bankrupts agents for collection, but holding as to the latter that the words appearing in the letter accompanying the delivery of the check served only to indicate the account to be credited.

Two circumstances are said by claimants to distinguish this case from No. 34, *Equitable Trust Company* v. *Rochling, et al., ante,* p. 248. The first is the fact that the check involved in the claimants' petition was not a cashier's check, but the check of a bank drawn upon its own bank of deposit. The distinction seems to us to require no difference in result where, as here, the check was treated by the bankrupts as current funds and at once placed to the credit of the claimants. It is suggested also that, although it was the practice of the bankrupts to credit checks to claimants as soon as deposited, it does not affirmatively appear that claimants asked or expected them to be credited in advance of collection, or that the items were listed as immediately entitled to interest. But the

mere absence of such proof cannot limit the effect of the dominant facts before us that the establishment of the credit was the objective of the claimants, and that that objective was attained when the credit was given. *Douglas* v. *Federal Reserve Bank,* 271 U. S. 489; *Burton* v. *United States,* 196 U. S. 283. We cannot assume, in the absence of proof, that claimants, whose controlling purpose was to secure a credit with Knauth, Nachod & Kuhne, were unwilling to accept the credit, when given, because it anticipated the collection of the paper by twenty-four hours. There is then no basis for the distinctions attempted, and this case is controlled by our decision in No. 34. Considering the checks in the light most favorable to claimants, as though the language relied on appeared on the face of both checks, claimants are nevertheless only general creditors of the bankrupts and their petition was rightly denied by the district court. The judgment of the district court is affirmed and that of the court of appeals is affirmed in part and

Reversed in part.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* STANDARD OIL COMPANY OF KENTUCKY.

STANDARD OIL COMPANY, INCORPORATED IN KENTUCKY, *v.* ATLANTIC COAST LINE RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 176 and 177. Argued October 4, 1927.—Decided November 28, 1927.

The plaintiff company, engaged in selling oil (viz., gasolene and refined, lubricating and fuel oils) within the State of Florida, had storage tanks on and near the Florida seaboard in which it kept supplies sufficient to meet the demands of its business for considerable

periods in advance, and which it replenished from time to time by fresh supplies purchased by it from other companies. The supplies so purchased were furnished by the vendors from places in the State of Louisiana and in Mexico, respectively; transported by them by sea at their own expense from those places to Florida, and delivered by them in bulk to plaintiff, by pumping from the ships through plaintiff's pipe lines, either directly into plaintiff's storage tanks or (in the case of the lubricating oil) into tank cars leased by plaintiff, in which the oil was moved by rail to its other storage tanks, a few miles distant, and deposited therein. Title passed to the plaintiff on delivery, and settlements with its vendors were made on the basis of the amounts so actually delivered by them, at the market prices in effect at times of delivery, or (in the case of fuel oil) at prices fixed in advance in yearly contracts calling for delivery of specified quantities each month. In the arrangements with the vendors, none of the oil so brought in was designated or intended for any destination in Florida beyond the storage tanks or tank cars into which it was delivered from the ships, and there was neither necessity nor purpose to send any of it through the storage stations to interior points by immediate continuity of movement, although delivery into storage tanks might occur contemporaneously with withdrawal of oil from the same tanks for the purpose of supplying plaintiff's bulk and service stations, and although sales of fuel oil to customers were largely contracted for by plaintiff in advance of shipment of such oil to plaintiff from point of origin.

Held, that rail transportation of the oil from the storage tanks to plaintiff's customers in Florida, or to plaintiff's bulk and service stations there from which it was sold to such customers, was intrastate commerce and subject to intrastate rates. P. 267.

16 F. (2d) 441, reversed; 13 *Id.*, 633, affirmed.

CERTIORARI, 273 U. S. 691, to a decree of the Circuit Court of Appeals, which modified a decree of the District Court enjoining the above-named Railroad Company from charging the Oil Company in excess of the intrastate rates for transportation of its products between certain points in Florida, and adjudging that the Oil Company recover the amount of such excess charges already collected.

Mr. Thomas W. Davis, with whom *Mr. William Marshall Bullitt* was on the brief, for Atlantic Coast Line Railroad Co.

The application of the rates depends upon the essential character of the commerce and not upon its accidents or isolated incidents. The acts of plaintiff and its customers, in making yearly contracts for petroleum products to be delivered at interior points in Florida, of themselves constitute interstate commerce. *Butler Shoe Co.* v. *U. S. Rubber Co.,* 156 Fed. 1; *Internat'l Book Co.* v. *Pigg,* 217 U. S. 91; *Flanagan* v. *Fed. Coal Co.,* 267 U. S. 222; *Spalding & Bros.* v. *Edwards,* 262 U. S. 66; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Shafer* v. *Farmers Co.,* 268 U. S. 189.

The question of where title passes is of no materiality; but the intention of the parties, as shown throughout their course of business, governs. *Penna. R. R.* v. *Clark Bros. Co.,* 258 U. S. 456; *Stafford* v. *Wallace,* 258 U. S. 495; *Sou. Pac. Term. Co.* v. *I. C. C.,* 219 U. S. 498; *Swift & Co.* v. *U. S.,* 196 U. S. 375; *B. & O. S. W. R. R.* v. *Settle,* 260 U. S. 166.

The movement of lubricating oil from Port Tampa, and of lubricating oil, gasoline, and kerosene from Jacksonville, are both interstate commerce and the reasoning of the Circuit Court of Appeals to the contrary is erroneous, because it makes the character of those movements to the interior depend not upon their intrinsic nature, but upon the amount of the small percentage sold locally. *Western Oil Co.* v. *Lipscomb,* 244 U. S. 346; *R. R. Comm.* v. *Worthington,* 225 U. S. 101; *Peoples Gas Co.* v. *Pub. Ser. Comm. of Penna.,* 270 U. S. 550; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Douglas* v. *Southern Ry. Co.,* 216 Ill. App. 148.

Decisions of the Interstate Commerce Commission: *Tampa Fuel Co.* v. *A. C. L. R. R.,* 43 I. C. C. 231; *Internat'l Agr. Corp.* v. *Director General,* 60 I. C. C. 726;

Alexander Grocery Co. v. *Beaumont, etc. Ry. Co.*, 104 I. C. C. 155.

Cases distinguished: *Sonneborn* v. *Keeling*, 262 U. S. 506; *Penna. R. R.* v. *Clark Bros.*, 238 U. S. 506; *Sou. Pac. Co.* v. *Arizona*, 249 U. S. 472; *Arkadelphia Co.* v. *S. L. & S. W. Ry.*, 249 U. S. 134; *Penna. R. R.* v. *Knight*, 192 U. S. 21; *Gulf, Colo. & S. F. Ry.* v. *Texas*, 204 U. S. 403.

Oil cases from North Carolina and Florida: *Atl. Coast Line* v. *Std. Oil Co.*, 12 F. (2d) 541; *State* v. *Seaboard etc. Ry. and Atl. Coast Line*, 109 Sou. 656; *Hamilton Co.* v. *Wolff*, 240 U. S. 258; *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469.

Mr. Charles G. Middleton, with whom *Messrs. Edward P. Humphrey* and *William W. Crawford* were on the brief, for the Standard Oil Company of Kentucky.

The business in Florida is local and intrastate rates should be applied to the transportation necessary to serve it. *Atl. Coast Line R.* v. *Std. Oil Co.*, 12 F. (2d) 541, certiorari denied, 273 U. S. 712; *Std. Oil Co.* v. *Atl. Coast Line*, 6 F. (2d) 911; *Seaboard etc. Ry.* v. *Florida*, 109 Sou. 656, certiorari granted, 273 U. S. 691.

When products are unloaded, stored and mixed with other property in the State, interstate commerce is ended for all purposes. *General Oil Co.* v. *Crain*, 209 U. S. 211; *Texas Co.* v. *Brown*, 258 U. S. 466; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

The business of supplying on demand local consumers, is a local business. *Pub. Util. Comm.* v. *Landon*, 249 U. S. 236; *Mo.* v. *Kansas Co.*, 265 U. S. 298; *People's Gas Co.* v. *Pub. Ser. Comm.*, 270 U. S. 550; *Pub. Util. Comm. of R. I.*, v. *Attleboro etc. Co.*, 273 U. S. 83.

The Florida ports are, in good faith and for business purposes, points of distribution for the Company's products. The movement out, therefore, is a separate and distinct distributing movement and not a continuation of

the original movement. *Gulf, Colo. & S. F. Ry.* v. *Texas,* 204 U. S. 403; *Chicago, M. & St. P. Ry.* v. *Iowa,* 233 U. S. 334; *Arkadelphia Co.* v. *St. Louis etc. Ry.,* 249 U. S. 134.

Distinguished: *Texas & N. O. R. R.* v. *Sabine Co.,* 227 U. S. 111; *B. & O. R. R.* v. *Settle,* 266 U. S. 166; *Stafford* v. *Wallace,* 258 U. S. 495; *Binderup* v. *Pathe,* 263 U. S. 291; *Lemke, Atty. Gen.* v. *Farmers Co.,* 258 U. S. 50.

The traffic in fuel oil is also intrastate traffic. *Washington etc. Co.* v. *G. N. Ry.,* 102 I. C. C. 363;

Distinguished: *Internat'l Corp.* v. *Director Gen'l,* 60 I. C. C. 726; *Alexander Grocery Co.* v. *Beaumont, S. L. & W. Ry.,* 104 I. C. C. 155; *Tampa Fuel Co.* v. *A. C. L.,* 43 I. C. C. 231.

Mr. Fred H. Davis, Attorney General of Florida, and *Messrs. Theodore T. Turnbull* and *George C. Bedell,* filed a brief as *amici curiae* for the State of Florida and its Railroad Commission, by special leave of Court.

Mr. Chief Justice Taft delivered the opinion of the Court.

This case comes here for review on petitions for certiorari to the United States Circuit Court of Appeals for the Sixth Circuit by both parties, allowed March 21, 1927 (273 U. S. 691). The District Court's opinion is reported in 13 F. (2d) 633; that of the Circuit Court of Appeals in 16 F. (2d) 441.

The case was begun by a bill in equity filed by the Standard Oil Company, a corporation of Kentucky, in the District Court for the Western District of Kentucky, against the Atlantic Coast Line Railroad Company, a corporation of Virginia, to secure an injunction forbidding the defendant from charging the complainant for the transportation of gasoline, refined oil, lubricating oil, and fuel oil, from the cities of Port Tampa, Tampa and Jacksonville, all in Florida, to other points in the same state,

at rates of freight other than the lawfully established intrastate rates for such commodities.

The bill avers that since June 15, 1923, the defendant railroad company has refused to accept shipments of the complainant from Port Tampa, Tampa and Jacksonville, Florida, to other points within the state at intrastate rates, and has compelled the complainant to pay thereon higher interstate rates, which it has done under protest; that according to the records of the complainant it has already overpaid to the defendant, between June 15, 1923, and April 17, 1925, the sum of $63,000. The prayer is for a temporary injunction and that, if the merits of the case are adjudged in favor of the complainant, a permanent injunction be granted and the case be referred to a special master to determine the overcharges, and that a judgment be entered therefor with interest at 6 per cent. from the date the same were accepted by the defendant until paid.

The answer denies that the charges collected were for other than interstate business. A motion to dismiss was made, on the ground that the complainant had an adequate remedy, either at the common law, or under a special remedy provided by the Florida statute. This motion to dismiss was overruled by the District Court, *Standard Oil Company* v. *Atlantic Coast Line Railroad Co.*, 13 F. (2d) 633; and while on appeal error was assigned for this, it does not appear to have been considered by the Circuit Court of Appeals, 16 F. (2d) 441, and is not assigned for error here. The jurisdiction rests on diverse citizenship of the parties and the only question before us is upon the merits.

The plaintiff maintains at Port Tampa, Tampa and Jacksonville large storage facilities, consisting of tanks and warehouses for receiving and storing gasoline, refined oil, lubricating oil and fuel oil. It does not produce or refine any of these products. Gasoline, refined oil and

lubricating oil it buys from the Standard Oil Company of Louisiana from its refineries at Baton Rouge, Louisiana, while the fuel oil it buys from the Standard Oil Company of New Jersey from Tampico, Mexico. These four varieties of oil products are brought into Port Tampa and Jacksonville in tank steamers owned and chartered by the sellers, and, with the exception of lubricating oil, the oil is pumped by ships' pumps from the steamers through pipe lines owned by the plaintiff into plaintiff's storage tanks at Port Tampa and at St. Johns River Terminal, Jacksonville, Florida. Lubricating oil is pumped from the tank steamers by ships' pumps into tank cars at Port Tampa, or at Jacksonville, and by them conveyed respectively over defendant's lines to plaintiff's storage tanks at Tampa, a distance of about nine miles from Port Tampa, or to Kings Road, a distance of about two miles from St. Johns River Terminal, near Jacksonville. All the products are purchased by the plaintiff to be delivered to it by the sellers at Port Tampa and Jacksonville, title not passing to the plaintiff until the products have been so delivered, settlement between the seller and purchaser being made upon the basis of the amount actually delivered into tank cars and tanks. The prices to be paid for gasoline, refined oil and lubricating oil are the current market prices in effect at the time the products are delivered to plaintiff at Port Tampa and Jacksonville. Fuel oil is purchased on yearly contracts at stipulated prices. The tank cars used by the plaintiff in its business are not owned by the railroad company, but are leased by the plaintiff and hauled by the defendant over its lines in common carrier service.

At Port Tampa, plaintiff maintains for the storage of gasoline five tanks, with an aggregate capacity of 110,000 barrels; for refined oil, storage tanks with a total capacity of 20,000 barrels; and for fuel oil, tanks with a total capacity of 127,000 barrels. At Jacksonville, it maintains

for the storage of gasoline, tanks with a total capacity of 162,000 barrels; for refined oil, storage tanks with a capacity of 40,000 barrels, and for fuel oil, storage tanks with a total capacity of 145,000 barrels.

Throughout Florida the plaintiff maintains 123 bulk stations where it has sufficient tankage and storage facilities for gasoline, refined oil and lubricating oil to meet the current needs of its customers supplied from such stations. These stations ordinarily get their supply of gasoline and refined oil from the storage tanks maintained at Port Tampa and Jacksonville, by means of tank cars. Very little, if any, gasoline or refined oil is delivered to consumers directly from the storage tanks at Port Tampa and Jacksonville. The gasoline and refined oils are delivered from the bulk stations to plaintiff's consumers by means of tank wagons. Plaintiff also maintains a large number of service stations in the State of Florida, which, in the usual course of business, are supplied with gasoline and refined oil directly from the bulk stations, although occasionally a service station is supplied with gasoline supplied in tank cars directly from Port Tampa and Jacksonville.

Under ordinary business conditions plaintiff keeps in its storage tanks at Port Tampa and at Jacksonville a sufficient supply of gasoline and refined oil to take care of its requirements for from forty-five to sixty days; a sufficient supply of fuel oil for from thirty to sixty days; and in its storage tanks at Tampa and at Kings Road a sufficient supply of lubricating oil for from sixty to ninety days, the exact time depending entirely upon business conditions and demands for the products in that section of the state. The plaintiff pays local taxes to the State of Florida on all of its products in hand in its storage tanks on the Florida assessing dates.

After the lubricating oil is placed in the storage tanks at Tampa and at Kings Road, it is distributed and sold in tank wagons, barrels and smaller containers, although a

small percentage of it is sent out in tank wagon cars to plaintiff's bulk stations and possibly to some small consumers.

The fuel oil is furnished by the Standard Oil Company of New Jersey to the plaintiff under a yearly contract for a million barrels to be delivered monthly in tank steamers at Port Tampa and Jacksonville as needed. Approximately ninety-five per cent. of the fuel oil sold by plaintiff in Florida is on contracts made before the oil has been shipped from the point of origin to plaintiff at Port Tampa and Jacksonville. Most of these are for a period of a year, covering the requirements of the various consumers, with average monthly deliveries stipulated, although, in actual practice, shipments from the storage tanks to the consumers are accommodated to their needs as under requirement contracts. There is no separation of the fuel oil under contract from that not under contract, all being of the same grade. At the time the shipment of the fuel oil is made from the point of origin, plaintiff can not say where any particular cargo of it, or any part thereof, will go after it has been pumped into the storage tanks, to whom it will go, or when it will be shipped. At the time of shipment from the point of origin, the only destinations which can be given are Port Tampa and Jacksonville, respectively.

The railway company has nothing to do with the boat movement of the products used by the plaintiff in its Florida business. There is no through rate and no joint arrangement of any character between the water carrier and the defendant. Movement by boat, while interstate commerce, is not actually under regulation by the Interstate Commerce Commission. From two to four boats per month, with an average capacity of 45,000 barrels each, discharge their cargoes in plaintiff's storage facilities at Port Tampa and Jacksonville. A boat requires from one to three days to discharge its cargo, and while boats are

engaged in discharging their cargoes into the storage tanks of plaintiff, tank cars are being loaded from the same storage tanks, for the purpose of supplying plaintiff's bulk stations, service stations and possibly a small amount directly to some consumers.

Plaintiff has been conducting its business in the manner here stated for many years, and it was not adopted for the purpose of evading the payment of interstate rates. Its business could not be conducted without the storage facilities herein described, and until June 15, 1923, all shipments by the plaintiff from Port Tampa, Tampa and Jacksonville over defendant's lines to other points in Florida over purely intrastate routes, were accepted by the defendant as intrastate commerce. Since June 15, 1923, however, the defendant has classified these shipments as interstate commerce, and collected freight on the basis of interstate rates. Generally, in respect to this transportation, the intrastate rates approved by the Florida State Commission are lower than the interstate rates under the classification of the Interstate Commerce Commission, and it is the difference in favor of the plaintiff in the intrastate rates which has led to this litigation.

The District Court held that all the transportation of oil by the defendant for the plaintiff, after the oil reaches the storage tanks or tank cars, in Tampa, Port Tampa or Jacksonville, is intrastate commerce, and that the plaintiff is entitled to secure the transportation necessary in that commerce at intrastate rates. 13 F. (2d) 633. The Circuit Court of Appeals modified the order of the District Court, 16 F. (2d) 441, and held that the fuel oil landed at Port Tampa is a continuous foreign and interstate shipment from Tampico to its ultimate destination in Florida where it is used; that the gasoline and kerosene shipments through to Port Tampa must also be classified as interstate shipments from Baton Rouge to the bulk stations where they are distributed; that the lubricating oils

received at Port Tampa must be treated as distributed from the Tampa and Jacksonville storage tanks, and that from those places its transportation is to be regarded as intrastate; that as to gasoline and kerosene in Jacksonville, as 13 per cent. of it received into the tanks is used locally at Jacksonville, it must all be regarded as intrastate; that as to Jacksonville fuel oil the record is obscure and the case must be sent back to the trial court for further evidence.

These two writs of certiorari are secured, the one by the plaintiff oil company to reverse the decision of the Circuit Court of Appeals in so far as it reversed the District Court, and the other by the defendant railway company to reverse that decision in so far as it affirmed the District Court.

It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business, and it arranges its storage capacity to meet the

future variation in its business needs at Tampa, Port Tampa, or Jacksonville or St. Johns River Terminal.

The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. *Chicago, M. & St. P. Ry. Co.* v. *Iowa,* 233 U. S. 334. The change from rail to ship has often been held consistent with a continuity of interstate or foreign commerce, even though there may be only local billing. *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande Railroad Co.,* 233 U. S. 479. On the other hand, in *Chicago, M. & St. P. Ry. Co.* v. *Iowa, supra,* the reshipment of an interstate shipment of coal after its arrival in the state in the same carload lots was held not inconsistent with the change from interstate to intrastate commerce. In *Baltimore & Ohio S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 170, a shipper billed his goods from one state to another, paying the interstate freight and reshipped them to another point in the second state, intending from the first to reach the latter destination, but interrupting the transportation only to take advantage of a difference in his favor between the through rate and the sum of those paid. It was held that the essential nature of the entire movement was in interstate commerce and that the shipper must pay the only lawful rate, which was the interstate commerce rate to the final destination. These cases are illustrations to show that the determination of the char-

acter of the commerce is a matter of weighing the whole group of facts in respect to it.

The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. Neither the sellers who deliver the oil, nor the railroad company that aids the delivery of the oil to the storage tanks and tank cars at the seaboard, has anything to do with determining what the ultimate destination of the oil is, or has any interest in it, or has any duty to discharge in respect to it, except that the railroad company, after the storage in Florida has been established for the purposes of the plaintiff company, accepts the duty

of transporting it in Florida to the places designated by the plaintiff company.

The compensation for the transportation of the oil through the pipe lines from the steamers to the storage tanks or to the storage tank cars, and the transportation of those cars to the seaboard storage tanks of the plaintiff, is not here in question, and we are not asked to determine whether such deliveries to the storage tanks and cars on the seaboard from the steamers are interstate or foreign commerce.

We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate.

The case is like that of *General Oil Company* v. *Crain*, 209 U. S. 211, in which the General Oil Company sought an injunction against the collection of a tax for the inspection of certain of its oils in Tennessee, which it had brought into Tennessee and stored in tanks, and marked in storage tanks as oil already sold in Arkansas, Louisiana and Mississippi, and which remained in Tennessee only long enough to be properly distributed according to the orders therefor, and other oil in other tanks marked to be sold in those states but for which no orders at the time of shipment from the manufacturing plants had been received. This Court held that the Tennessee tax was not a burden on interstate commerce as applied to oil coming from certain states though ultimately intended for sale and distribution in states other than Tennessee; that the oil was subject to a tax while it was being stored in Tennessee for convenience of distribution and for reshipping in tank cars and barrels; that this was business done in Tennessee, where the oil was brought to rest, and was for a purpose outside its mere transportation.

It is not a question of maintaining the identity of oil as if a fungible in storage tanks through which it passed. The facts indicate that the plaintiff itself makes no such distinction and certainly agrees with no one to make such

a distinction. The fuel oil is not different from the other kinds. While the fuel oil is purchased by the plaintiff from a selling company, which has a year's contract, the seller delivers it from Tampico, at the Florida seaboard, as it is likely to be needed to meet the obligations of a number of yearly contracts made by the plaintiff for its delivery in certain parts of Florida. No oil which comes in is labeled or identified in any particular way with any particular company, except after it is shipped to that company from Tampa or from Jacksonville. There is no passage of title from plaintiff to the contract purchasers, and there is no setting apart of particular oil, until the shipments are made at the end of this interval of weeks and months in accordance with the needs of those who have contracted to buy it.

The argument is made that these are continuous streams of oil from Baton Rouge or Tampico into bulk stations in the interior of Florida where it is sold to the customers of the plaintiff, and that its interstate character continues through that entire passage. It may be, as suggested in the argument, that oil is being discharged into plaintiff's receptacles for its storage at the same time that it is being discharged from the storage tanks into storage tank cars for its distribution, but that is not at all inconsistent with its being a closing of an interstate or foreign transportation and a beginning of intrastate distribution for the purposes and business of the plaintiff.

We think the view of the Supreme Court of Florida in a mandamus case in respect to these very rates is the correct one. *State* v. *Seaboard Air Line Ry. Co.; Same* v. *Atlantic Coast Line Railroad Co.*, 109 Sou. 656. We concur in the reasoning and conclusions of the United States Circuit Court of Appeals for the Fourth Circuit in *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co. of New Jersey; Seaboard Air Line Ry. Co.* v. *Same*, 12 F. (2d) 541.

Reliance is put on *Stafford* v. *Wallace*, 258 U. S. 495, to sustain the claim that this transportation of plaintiff's oil in Florida is interstate commerce. In that case the question under consideration was the validity of the Packers and Stockyards Act of Congress of 1921, c. 64, 42 Stat. 159, providing for the supervision by Federal authority of the business of the commission men and of the live stock dealers in the great stock yards of the country, and it was held that for the purpose of protecting interstate commerce from the power of the packers to fix arbitrary prices for live stock and meat through their monopoly of its purchase, preparation in meat, and sales, Congress had power to regulate the business done in the stockyards, although there was a good deal of it which was, strictly speaking, only intrastate commerce. It was held that a reasonable fear upon the part of Congress, that acts usually affecting only intrastate commerce when occurring alone, would probably and more or less constantly be performed in aid of conspiracies against interstate commerce, or constitute a direct and undue obstruction and restraint of it, would serve to bring such acts within lawful Federal statutory restraint.

The Court relied much on the case of *United States* v. *Ferger*, 250 U. S. 199, where the validity of an act of Congress, punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce, was in question. It was there contended that there was and could be no commerce on a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this Court, speaking through Chief Justice White, answered the objection by saying:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its

effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs,* 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

The use of this authority as a basis for the conclusion in *Stafford* v. *Wallace* clearly shows that the case can not be cited to show what is interstate and what is intrastate commerce in a controversy over rates to determine whether they come normally within the regulation of Federal or State authority.

Our conclusion is that, in all the cases presented by the plaintiff in its bill, intrastate rates should have been applied and should be applied in the future, so long as the facts remain as they are now. This leads to a reversal of the decision of the Sixth Circuit Court of Appeals as to fuel oil from Port Tampa, as to gasoline and kerosene from Tampa, and an affirmation of its decision as to lubricating oil through Port Tampa; an affirmation of its decision as to gasoline from Jacksonville, as to kerosene from Jacksonville, and as to lubricating oil from Jacksonville. As to fuel oil from Jacksonville, the Circuit Court of Appeals left the matter undetermined. We think that fuel oil also from Jacksonville should be treated as subject to intrastate rates. The result is that the decision of the Circuit Court of Appeals is partly affirmed and partly reversed, that of the District Court is wholly affirmed, and the case is remanded to the District Court for further proceedings.

Affirmed in part; reversed in part.

BOTHWELL ET AL. *v.* BUCKBEE, MEARS COMPANY.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 169. Submitted October 3, 1927.—Decided December 5, 1927.

1. Since a contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is located, is not interstate commerce, a State may prohibit a foreign insurance company from doing business within its borders without first obtaining a license. P. 276.
2. While a State may not forbid a resident from making a contract with a foreign insurance company outside the State, it may forbid the solicitation of such contract within the State by a company which has not complied with its laws, and may refuse the aid of its courts in enforcing a contract made in another State but growing out of such solicitation. P. 276.
3. A State may refuse to enforce a contract made by one of its residents in another State with a foreign insurance company, where the contract contemplates the performance by the company within the State of acts forbidden by its laws. P. 278.
4. On writ of error or certiorari to a State court, this court will not take judicial notice of statutes of another State not proved or judicially noticed in the court below. P. 279.

169 Minn. 516, affirmed.

CERTIORARI, 273 U. S. 689, to a judgment of the Supreme Court of Minnesota affirming dismissal of an action brought by the receivers of a Maryland insurance company to recover the amount of an assessment made on the respondents under a policy for strike insurance. See also 166 Minn. 285.

Messrs. Morton Barrows, George P. Metcalf, and *Walter L. Clark* were on the brief for petitioners.

Messrs. William H. Oppenheimer and *Montreville J. Brown* were on the brief for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action was brought in a court of Minnesota. The plaintiffs below, petitioners here, are the receivers of the Employers' Mutual Insurance and Service Company, a Maryland corporation. The defendant, Buckbee, Mears Co., a Minnesota corporation, is a printing concern with its plant and only place of business in that State. The action is brought for the amount of an assessment made upon the insured pursuant to a policy for "strike insurance" issued by the Company. The only defense relied upon below, or open here, is that the Company (and hence its receivers) cannot maintain a suit in a court of Minnesota, because it did not, before writing the policy, comply with the provisions of the Minnesota law relating to foreign insurance companies doing business within the State. After proceedings which it is unnecessary to detail, 166 Minn. 285, the trial court sustained that defense. Compare *Seamans* v. *Christian Bros. Mill Co.*, 66 Minn. 205. Its judgment was affirmed by the highest court of the State. 169 Minn. 516. This Court granted a writ of certiorari. 273 U. S. 689.

The statutes of Minnesota provide that a foreign insurance company shall not do business within the State unless it secures a license so to do; and that to this end it must file a copy of its charter and by-laws and a statement showing its financial condition; must appoint the Insurance Commissioner its attorney in fact upon whom proofs of loss and process in any action may be served; and must make a deposit of securities (or its equivalent) for the protection of Minnesota policy holders, G. S. 1923, §§ 3313, 3318, 3319, 3711, 3713, 3716. The statutes further require that all persons engaged in the solicitation of applications of insurance shall be licensed; and they declare specifically that it shall be unlawful for any person,

firm or corporation to solicit or make or aid in the soliciting or making of any contract of insurance not authorized by the laws of the State, and that any person, firm or corporation not complying with the requirements as to the licensing of agents and solicitors shall be guilty of a misdemeanor, G. S. 1923, §§ 3314, 3348, 3349, 3366.

It is stipulated that the Company did not comply with the requirements of the Minnesota law; and that the contract was effected by the Company's sending a representative into the State who solicited the insurance there, by the defendant's filling out in Minnesota one of the blank forms for application distributed by the Company's agent there, and by the defendant's then mailing it, together with a check for the first premium, to the Company's office in Maryland, upon receipt of which the policy was signed by the Company in Maryland and mailed to the defendant.

The receivers rely upon *Allgeyer* v. *Louisiana*, 165 U. S. 578, and *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346. Their contention is that, since the contract was made in Maryland, it was not subject to the prohibitions of the Minnesota law; that the contract was valid where made; and that, hence, Minnesota may not refuse the aid of its courts for enforcing it. Those cases are not applicable. They hold that a State may not prohibit either a citizen or a resident from making a contract—in other words, doing an act—in another State. The defense here rests upon a wholly different ground. It is that the making of the contract involved, and the performance of the contract required, the doing in Minnesota of acts which its laws prohibited; and that the contract contemplated the Company's doing there still other forbidden acts.

A contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is

located, is not interstate commerce. *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495; *National Union Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71, 75. Hence, Minnesota had the power to prohibit the Employers' Mutual Company from doing business within the State without first complying with the prescribed conditions; and could refuse the aid of its courts in enforcing a contract which involved violation of its laws, *Chattanooga Building & Loan Assoc.* v. *Denson,* 189 U. S. 408; *Interstate Amusement Co.* v. *Albert,* 239 U. S. 560. See also *Munday* v. *Wisconsin Trust Co.,* 252 U. S. 499. The parties had, under the *Allgeyer* and *Cotton Compress* cases, the constitutional right to make in Maryland a contract of insurance despite a prohibition of the Minnesota law. But the Company, a foreign corporation, had no constitutional right to solicit the insurance in Minnesota by means of an agent present within that State. For the act of solicitation there the State might have punished the agent; and also the Company as principal. *Hooper* v. *California,* 155 U. S. 648; *Nutting* v. *Massachusetts,* 183 U. S. 533. Compare *Commonwealth* v. *Nutting,* 175 Mass. 154. As the contract was not a later independent act, but grew immediately out of the illegal solicitation, and was a part of the same transaction, being inseparably tied to it by the use of the application blank illegally distributed, the contract was tainted with the illegality. *Armstrong* v. *Toler,* 11 Wheat. 258. Because of such taint the State, under rules of general application, would have had the right to refuse to enforce it, although made in Maryland, even if it had been wholly unobjectionable in its provisions. Compare *Delamater* v. *South Dakota,* 205 U. S. 93, 97–103; *American Fire Insurance Co.* v. *King Lumber Co.,* 250 U. S. 2, 11–12.

But the contract was also in its terms obnoxious to the Minnesota law. It required the Company to perform, in Minnesota, acts which it was prohibited from doing there.

The Company agreed to defend, on behalf of the insured, any suits or other legal proceedings brought by striking employees against the insured to enforce claims arising out of any strike, and to pay any expenses incurred by the Company in so doing. This covenant necessarily involved performance in Minnesota, as suits against the insured would be brought in that State, among other reasons, because it was a Minnesota corporation and had no place of business elsewhere. The Company also covenanted to indemnify the insured for "direct loss of average daily net profits and fixed charges" due to strikes. The contract did not specify the place where payment for the loss should be made, so that under the common rule the insurer would be required to make the payment in Minnesota, the domicile of the insured. *Pennsylvania Mutual Fire Insurance Co.* v. *Meyer,* 197 U. S. 407, 416.

Besides these acts which the Company bound itself to perform in Minnesota, the contract reserved to it the right to do, in Minnesota, and the Company contemplated doing there, others acts forbidden by its laws, namely, the right to inspect the plant and the books of account and papers of the business; and the right to interrogate persons connected with it. Moreover, the contract clearly contemplates that not only these examinations, but the appraisals and other acts provided to be done by the Company in the course of the adjustment of losses, shall be done in Minnesota. All these things were activities of the insurance business which the Company was prohibited by valid statutes from doing within the State. *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer, supra,* pp. 414–5. Compare *Commercial Mutual Accident Co.* v. *Davis,* 213 U. S. 245, 256. Under rules of law generally applicable a State may refuse to enforce a contract which provides for doing within it an act prohibited by its laws. Compare *The Kensington,* 183 U. S. 263, 269; *Bond* v. *Hume,* 243 U. S. 15, 21; *Union*

Trust Co. v. *Grosman,* 245 U. S. 412, 416; *Grell* v. *Levy,* 16 C. B. (N. S.) 73.

It is suggested that under a Maryland statute the petitioners are not mere equity receivers but quasi-assignees, and that this places them on a different footing from that which the insurance company would have occupied if the suit had been brought by it. In support of this contention, the full faith and credit clause of the Constitution and cases such as *Converse* v. *Hamilton,* 224 U. S. 243, are invoked. But the Maryland statute was not set up in the state courts, and as they did not take judicial notice of it, it will not be noticed here. *Hanley* v. *Donoghue,* 116 U. S. 1; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 371. For this and other reasons we have no occasion to enquire into its effect.

Affirmed.

NEW MEXICO *v.* TEXAS.

IN EQUITY.

No. 2, Original, Argued December 2, 1924.—Decided December 5, 1927.

1. A copy of memoranda and field notes of a survey of part of the boundary between Mexico and Texas, made in 1852 by a Mexican engineer by order of the Mexican Member of the Joint Boundary Commission, under the Treaty of Guadalupe-Hidalgo, was admissible in evidence upon authentication by the Mexican Boundary Commissioner having custody of the original. P. 296.
2. A motion, by the party who produced it, to strike out an authenticated copy, accompanied by evidence adduced to prove that the party had been mistaken in believing that there was any original in the place from which the authentication was made, comes too late, when deferred until the day when the taking of testimony is closed by mutual agreement, two years after the copy was introduced by the opposite party and treated by both sides as evidence in the case. P. 297.
3. The New Mexico-Texas boundary, in the area involved in this suit, is the middle of the main channel of the Rio Grande, as that river

flowed in 1850, extending southwardly from the 32d parallel of North Latitude to the parallel of 31 degrees, 47 minutes in the course and location found and described in Section V (1) of the report of the Special Master in this case; the intersection of the east bank of the river with the 32d parallel is to be taken at a point 600 feet west from Monument No. 1 of Clark's Survey on that parallel made in and after 1859 in locating the Texas-United States boundary, as said monument No. 1 was reëstablished by Joint Commissioners of the United States and Texas, appointed pursuant to a Joint Resolution of Congress passed in February, 1911; and the middle line of the channel is to be taken 150 feet from the east and west banks of the river respectively, as found by the Special Master. P. 303.

In arriving at this conclusion, the Court finds and decides as follows:

4. That the testimony of ancient witnesses called by New Mexico as to their recollection of the old river, is far from satisfactory, and does not, in view of the other evidence, sustain the burden resting on New Mexico of proving her claim that the location was farther east than the one claimed by Texas and found in this case. P. 300.
5. That the greater weight of the evidence shows that Clark's Monument No. 1 did not coincide with his Station 1, but was located at least 2783 feet west thereof, substantially as reëstablished by the Joint Commission of the United States and Texas above mentioned. P. 300.
6. That under the Joint Resolutions of February and August, 1911, preceding and conditioning the admission of New Mexico as a State, she is bound by the reëstablishment of the Monument by the Commission and cannot question its accuracy. *Id.*
7. That this necessarily extends the Clark boundary line along the 32d parallel to the east bank of the river, at a point 600 feet west of the reëstablished Monument. *Id.*
8. That according to the greater weight of the evidence, the river, in 1850, ran, as shown by certain surveys, patents and maps relied on by Texas, on the course and in the location set forth and described in the Special Master's report. *Id.*
9. That this conclusion is reinforced by the tacit and long-continued acquiescence of the United States, while New Mexico was a Territory, in the claims of those holding the land in controversy under Texas surveys and patents, and the undisturbed possession of the Texas claimants. *Id.*

10. New Mexico, having explicitly declared in her Constitution of 1912 that her boundary between parallels of 32° and 31° 47′ followed the main channel of the Rio Grande as it existed on the ninth day of September, 1850, and this having been confirmed by the United States by admitting her as a State with the line thus described as her boundary, and also approved by Texas in her pleadings, New Mexico cannot question this limitation of her boundary and lay claim to lands east of that line because of changes in the river course since 1850, due to the process of accretion. P. 302.

THIS suit was brought in this Court by the State of New Mexico to settle a controversy over a portion of the boundary between that State and the State of Texas. After argument on final hearing, the case was referred to a Special Master, 266 U. S. 586. The present decision is on exceptions taken by both parties to the Master's report. The exceptions of New Mexico are overruled, and those of Texas sustained. The bill is dismissed and a decree ordered under the cross bill.

By an order made on April 9, 1928, when this part of the volume was nearing the press, certain modifications in the opinion were directed, which are followed in the printing here. The order will be published in volume 276.

Mr. Frank W. Clancy, with whom *Mr. Jay Turley* was on the briefs, for complainant.

Mr. W. A. Keeling, Attorney General of Texas, with whom *Messrs. John C. Wall, Wallace Hawkins,* Assistant Attorneys General, and *W. W. Turney* were on the briefs, for defendant.

Mr. Thornton Hardie as *amicus curiae,* on behalf of L. M. Crawford, by special leave of Court.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the State of New Mexico against the State of Texas in 1913 to settle a controversy

concerning the location of the part of their common boundary extending southwardly in the valley of the Rio Grande River an air-line distance of about fifteen miles from the parallel of 32 degrees north latitude to the parallel of 31 degrees 47 minutes on the international boundary between the United States and Mexico. This is an off-set in the southern boundary of New Mexico extending nearly to El Paso.

In its bill New Mexico alleged that under certain designated statutes and other public proceedings [1] the channel of the Rio Grande as it existed in 1850 became and was the boundary of Texas and the Territory of New Mexico between these two parallels, that this boundary had "remained unchanged" and "now is" the boundary between the two States, and that a correct delineation of this line in the middle of the channel was shown on a map attached as an exhibit to the bill; and prayed specifically that "the middle of the channel of the Rio Grande as it existed in the year 1850," and as shown upon this map, be "decreed to be the true boundary line." In its answer and cross bill Texas also alleged that the true boundary line is the channel of the Rio Grande as it existed in the year 1850, but denied the correctness of the location shown on the map exhibited with the bill, and alleged that the line was correctly delineated on a map attached as an exhibit to the answer; and prayed that the boundary line

[1] Legislative compact of 1850 between the United States and the State of Texas. 9 Stat. 446, c. 49; 2 Sayles' Early Laws of Texas, 267; Pres. Proclamation, 9 Stat. 1005. Gadsden Treaty of 1853 with the Republic of Mexico. 10 Stat. 1031. Act of 1854 declaring the southern boundary of the Territory of New Mexico. 10 Stat. 575, c. 245. New Mexico Enabling Act of 1910. 36 Stat. 557, c. 310. Constitution of New Mexico, Art. 1. Joint Resolution of 1910 reaffirming the boundary line between Texas and the Territory of New Mexico. 36 Stat. 1454. Joint resolution of 1911 admitting New Mexico as a State of the Union. 37 Stat. 39.

"be declared to be the middle of the channel of the Rio Grande as it actually existed in the year 1850," and as shown upon the map exhibited with the answer. And in its answer to the cross bill New Mexico again stated that the true boundary line "is the channel of the Rio Grande . . . as it existed in the year 1850," but denied that this was correctly located on the map exhibited with the answer.

Each State thus asserted that the true boundary line is the middle of the channel of the Rio Grande in 1850. Neither alleged that there had been any change in this line by accretions. And the only issue was as to the true location of the channel in that year.

Upon this single issue a large mass of testimony was taken before examiners, during a period of several years. Some of this, as bearing evidentially upon the location of the river in 1850, related incidentally to subsequent changes by accretions and avulsions. In 1924 New Mexico, on its motion, was allowed by the Court [2] to take, subject to rebuttal, the additional testimony of one witness on the question whether, assuming that in what is known as the Country Club area, the river had been located in 1850 on the western side of the valley as claimed by Texas, it had thereafter moved eastward by accretions. But—still claiming that in fact the river was located in 1850 on the eastern side of the valley, in a position that was inconsistent with such accretions—New Mexico neither averred in its motion that there had in fact been such accretions, nor sought to amend its pleadings so as to allege either that they had taken place, or that, if so, the boundary line had been changed by reason thereof. And the question as to the location of the middle of the channel in 1850, remained, as before, the sole issue under the pleadings.

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[2] 264 U. S. 574.

Thereafter, the Court referred the cause to a special master, with directions to make special findings, based upon the entire record, on all material questions of fact, and report the same with his recommendations.[3] The master, after a full hearing,[4] made his report; to which both States filed exceptions. And the cause has been heard on the report and these exceptions.

In the territory in dispute the Rio Grande flows southwardly through a plain of alluvial and sandy bottom land, composed largely of detritus, and bordered on the east and west by ranges of hills. The valley is about four miles wide at the northern end and narrows gradually to a canyon or gorge at the southern end. The river in normal times is very shallow; but at frequently recurring periods freshets caused by melting snow in the mountains and heavy rains or cloudbursts, flood and overflow the banks of the river and result in many changes in the channel both by erosions and accretions and by sudden and violent avulsions.

At the time the bill was filed the river ran on the eastern side of the valley in the northern portion of the area in dispute, and, crossing the valley in the southern portion, ran on the western side until it reached the gorge. Neither State claims that this was the location in 1850. New Mexico, on the one hand, contends that the river then ran the entire distance from the 32nd parallel to the gorge on the eastern side of the valley, near the eastern range of hills. Texas, on the other hand, contends that it crossed the parallel about three-fifths of a mile westwardly, ran farther to the west in the northern portion of the disputed area, and, crossing about midway to the western side of the valley, ran most of the way to the

[3] 266 U. S. 586.

[4] Printed briefs aggregating 2150 pages were submitted to him.

gorge near the western range of hills. That is, broadly speaking, New Mexico contends that the river then ran on the eastern side of the valley, and Texas, that it ran mainly on the western side. The distance between the two locations midway of the disputed area is about four miles.

The master made an elaborate and thorough report in which he considered at length the contentions of the two States and the salient features of the testimony. He found, on all the evidence, that the allegations of New Mexico as to the location of the Rio Grande "as it existed in the year 1850" were not sustained, and that the river then followed, in general, the course claimed by Texas, and on the dates nearest to 1850 of which there was credible evidence, was located as particularly described in the report,[5] and had an average width of 300 feet; but that thereafter, between 1852 and the filing of the bill, the channel in certain portions of the course, including the Country Club area, was moved eastward by reason of accretions.[6] And he reported that the true boundary line when the bill was filed was the middle of the channel of the river in the location occupied after such accretions, as described in the report,[7] and recommended that this be fixed 150 feet from the east and west banks, respectively, as found by him.

The questions presented are whether the master's finding as to the location of the river in 1850 is correct; and, if so, whether the boundary line was subsequently changed by accretions, and to what extent.

Location of the Rio Grande in 1850.

1. New Mexico, while not excepting specifically to the ultimate finding of the master as to the location of the

[5] Section V (1). [6] Section VI. [7] Section VII.

river in 1850, has filed various exceptions to matters leading to this general finding, by which it challenges the correctness of certain incidental statements of the master; his conclusions as to certain portions of the evidence; and the fact that he refers to certain official reports and maps which he thought might be judicially noticed, several of which he filed as exhibits to his report. Some of these exceptions are plainly immaterial. And none of them need be dealt with separately, as they are merged in the ultimate question whether, upon the competent evidence, viewed in its entirety, the master's finding as to the location of the river in 1850 is correct.

The evidence relating to this matter is so voluminous[8] that it is entirely impracticable to refer to it in any detail. And while we have considered the various contentions relating to its many phases, we can here deal with the question of its weight only in the broadest outlines.

To establish its contention as to the location of the river New Mexico relied mainly upon the testimony of a large number of Indians and Mexicans, most of whom—with others who did not testify—had been members of different parties that had accompanied its engineers on various trips down the river between 1912 and 1914, shortly before and after the filing of the bill, for the purpose of pointing out the location of the old river; the testimony of a former registrar of the Land Office, who had known the river in 1857 and 1858 when conductor on a stage route and had been employed by New Mexico to find witnesses having knowledge of the old river; and a survey of the 32nd parallel made in 1859 by John H. Clark, United States commissioner, with the testimony of its engineers, surveyors and others relating thereto.

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[8] The entire evidence covers about 3500 pages of the record, supplemented by about 200 maps, photographs and other documentary exhibits.

2. While there were various discrepancies and contradictions in the testimony of the witnesses as to the location of the old river, their evidence was to the general effect that at different times between 1850 and 1860, it ran, as they recollected, on the eastern side of the valley, near the eastern range of hills, substantially as claimed by New Mexico.

The master, in dealing with the evidence of the Indian and Mexican witnesses, said: "Most of the witnesses were illiterate; they were unable to estimate distances with any degree of accuracy. . . . All . . . were old men, some very old, and some were only ten years of age or less at the date when they passed along the river between the years 1850 and 1860. There was much evidence that in those years the country was wild and infested with hostile Indians, . . . Many of the witnesses travelled part of the time at night. From White's Ranch to Alamitos, there was but one, if any, house prior to 1857. The names given by the witnesses, therefore, to points along the river with relation to which . . . they located the river . . . , referred to bends, hills, bosques, esteros, cottonwood trees, etc. There was no stage coach route prior to 1857. Many of the witnesses had not travelled along the river since the Civil War; and only a few claimed to have had any continuous knowledge of the river. . . . Moreover, most of the whole river plane or valley had been altered in condition since 1850–1860. In those years, it was uninhabited, uncultivated, and covered in many parts near the river with thick bosques (groves or forests) of cottonwood and tornillo trees. The . . . land, in 1912–1914, was considerably settled and cultivated; the town of Anthony had come into existence; there were farms, cornfields, and alfalfa fields, paved roads and a railroad, in many places where they located the bed of the old 1850 river. . . . In

many years, at the time of annual floods . . . the river covered the whole valley from its western to its eastern margin. When the floods subsided, the river at times resumed its former channel, and at times it did not. . . . [As] testified to by plaintiff's engineer witness, Post: 'There are old river beds or indications of old river beds in various parts of the valley . . . If I had started out to survey old river beds . . . I would not be through surveying yet.' He further stated that in surveying throughout the valley, he had seen old water courses and river beds as distinct and more distinct than that claimed by the witnesses to be the River of 1850. The river has always carried and deposited large quantities of silt, mud and other detritus. At times of flood, many old channels were filled with deposits and their presence effaced. The river valley, at places, . . . has been raised in level many feet. The Santa Fe Railroad has been obliged to raise its railroad bed several times, and in doing so has, at places, excavated from the sandhills at the east. In describing the manner in which they located the river in 1912–1914, the witnesses testified that they walked along depressions, low ground, old channels, etc., which they pointed to Post and the surveyors as the bed of the River of 1850, according to their recollection; that this bed, as a rule, showed banks not more than two or three feet high; . . . that for a considerable distance, at various points, the bed of the old river was then occupied by the railroad tracks, by the county road, and by the river as it flowed in 1912–1914. Many of the witnesses . . . testified that, before they made their trips, the channel of the old river had been outlined by the surveyor's stakes. Several witnesses said that they followed the stakes. . . . Under all the conditions outlined above, I consider it improbable that Indian and Mexican witnesses would be able to trace accurately, on

the ground, the course of a river as it flowed over fifty to sixty years prior."

The master further found that the identification of the point from which these witnesses began their location of the old river, as the place called Alamitos where there had been prior to 1857 a camp or watering place for travelers on the east bank of the river, was "particularly doubtful and difficult of belief"; and that the road leading up the river past Alamitos, to which they referred, did not run on the eastern side of the valley or along the eastern sand hills, as claimed, but up the valley bottom, west of the location of the river claimed by New Mexico and in a position incompatible therewith. And, after referring to the testimony of the former registrar of the Land Office, he concluded: "In view of all the evidence in the case, I am unable to attach great weight or credit to the testimony of the plaintiff's witnesses as to the location either of the bed or of the course of the Rio Grande as it flowed in 1850. . . . I am of opinion that their memories were defective, and especially that they were mistaken as to dates, and that they confused the course of the river as they knew it in later years with their knowledge of it in earlier years. If not so mistaken . . . it is apparent that many of them were testifying as to . . . those periods of the year when the river was in flood and may well have been flowing along the eastern as well as the western banks. There is also evidence . . . as to the existence on the east side of the remains of an old river channel of 1826, which had left sloughs or esteros at various points; also as to the existence of old ditches. . . . It is probable that the river, subsiding from floods, at times ran in these sloughs, esteros, or ditches, as a minor channel or branch, and that it was thus mistaken by some witnesses for the main channel of the river."

3. The survey of John H. Clark, United States commissioner, was made by him as a member of the United States and Texas Boundary Commission,[9] in and after 1859, of a portion of the boundary line between Texas and the Territories of the United States, including the lines of the 103rd meridian and the 32nd parallel between that meridian and the channel of the Rio Grande River, which then constituted part of the boundary between Texas and the Territory of New Mexico,[10] connecting on the west with the line running down the channel of the river here in dispute. In 1891 the lines of the meridian and parallel established by Clark were "confirmed" by an Act of Congress and a Joint Resolution of the Texas Legislature as boundary lines between Texas and the Territory of New Mexico.[11]

The significance of Clark's survey lies in its bearing upon the location of the east bank of the Rio Grande in 1859. His report shows, admittedly, that he placed at the initial point of the survey on the 32nd parallel, a pyramid of stone, designated as Monument No. 1, standing 600 feet

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[9] This Commission was appointed under a Texas Act of 1854, 3 Gammel's Laws of the State of Texas, 1525, and an Act of Congress of 1858, 11 Stat. 310, c. 92, to run and mark the entire boundary line between Texas and the territories of the United States from the point where it left the Red River to its intersection with the Rio Grande. The Commissioners began at the Rio Grande, but soon separated and the survey was continued by Clark, the United States commissioner. See, generally, *Oklahoma* v. *Texas*, 272 U. S. 21, 26. His original report, with the accompanying field notes and maps, have long been lost; but a copy of portions thereof contained in Sen. Ex. Doc. No. 70, 47th Cong., 1st Sess., in which the maps appear on a reduced scale, was introduced in evidence by stipulation.

[10] Legislative compact of 1850 between the United States and the State of Texas; Gadsden Treaty of 1853 with the Republic of Mexico; and the Act of 1854 declaring the southern boundary of the Territory of New Mexico: cited in Note 1, *supra*.

[11] 26 Stat. 948, 971, c. 542; 10 Gammel's Laws of the State of Texas, 195. See *Oklahoma* v. *Texas*, *supra*, 31.

from the east bank of the river. This monument has long since disappeared. New Mexico contended that, as shown by the field notes and as re-established by its engineers with reference to other objects called for in the field notes and shown on the maps, the location of this Monument coincided with that of Station 1 on the survey of the parallel from which Clark took the bearings of various objects, and that the river bank was thereby fixed at a point 600 feet west of this Station—whose location was agreed upon—substantially as shown by the witnesses who testified to the location of the old river. On the other hand, Texas contended that, as shown by the field notes and as re-established by its engineers with reference to other objects, this Monument was located at a point about 2800 feet west of Station 1, and the river bank was thereby fixed at a like distance west of the location claimed by New Mexico; and further, that in 1911–1913 this Monument had been re-established at a point about 200 feet west of the location shown by its witnesses, by joint commissioners of the United States and Texas, and this re-establishment was binding upon New Mexico, irrespective of its precise accuracy.

The basis of the latter contention is this: Before the Territory of New Mexico had been admitted as a State under the Enabling Act of 1910,[12] a constitution was adopted for the proposed State,[13] which, disregarding entirely the lines of Clark's survey, declared in general terms that its boundaries ran along the 103rd meridian to the 32nd parallel, along that parallel to the Rio Grande, as it existed on September 9, 1850, and with the main channel of the river, as it existed on that date, to the parallel of 31 degrees and 47 minutes. Thereupon, in

[12] 36 Stat. 557, c. 310.

[13] Ho. Doc. 1369, 61st Cong., 3rd Sess. This constitution was adopted by a constitutional convention in November, 1910, and ratified by the voters in January, 1911.

February, 1911, Congress, by a Joint Resolution [14] declared that any provision of this constitution that tended to annul or change the established boundary lines between the Territory and the State of Texas [15] run by Clark in 1859 and 1860, "shall be of no force or effect" and be construed so as not to affect or alter the Clark lines in any way; and that the ratification of these lines by the United States and the State of Texas in 1891 "shall be held and deemed a conclusive location and settlement of said boundary lines," and the lines run and marked by monuments along the 103rd meridian and the 32nd parallel shall "remain the true boundaries of Texas and New Mexico." This Resolution further authorized the President, in conjunction with the State of Texas, to re-establish and re-mark the Clark boundary lines, and, for such purpose, to appoint a commissioner who, with a commissioner for the State of Texas, should re-mark the boundary between the Territory of New Mexico and Texas on the line run by Clark for the 103rd meridian to the southeast

[14] No. 6. Reaffirming the boundary line between Texas and the Territory of New Mexico. 36 Stat. 1454.

[15] The Senate Judiciary Committee in recommending the passage of this resolution, said: "The contention of the constitutional convention of New Mexico . . . seems to be that the boundary line . . . from latitude 36.30° north to latitude 32° north is located west of the true one hundred and third meridian . . . , and that a strip of territory between the true . . . meridian and the line as now established and recognized by the United States and the State of Texas . . . of right belongs to New Mexico." Sen. Rep't No. 940, 61st Cong., 3d Sess. And the President, in a message recommending its passage, said that the proposed constitution "contains a clause purporting to fix the boundary line between New Mexico and Texas which may reasonably be construed to be different from the boundary lines heretofore legally run, marked, established, and ratified by the United States and the State of Texas, and under which claims might be set up and litigations instigated of an unnecessary and improper character." Ho. Doc. No. 1076, 61st Cong., 3d Sess.

corner of New Mexico, and thence west with the 32nd parallel as determined by him to the Rio Grande; the position of the boundary lines as marked by him to be determined by his old monuments and lines where found on the ground, or otherwise by their original position as shown by parol evidence or his topographical maps and field notes.

In August, 1911, Congress, in a Joint Resolution [16] declaring that New Mexico should be admitted as a State upon compliance with certain specified conditions, specifically provided that such admission "shall be subject to the terms and conditions of" the Joint Resolution of February, 1911. In February, 1912, New Mexico was admitted as a State.[17]

Thereafter, the joint commissioners appointed to remark the Clark boundary lines—commonly called the Scott-Cockrell Commission—submitted to the President reports of their proceedings. In one of these, relating to Clark's Monument No. 1 on the 32nd parallel, they stated that, on completing their field work in September, 1911, being unable after a second effort to locate this Monument from any physical facts found upon the ground or oral testimony, they had determined the approximate scale of the topographical map accompanying Clark's report, and measuring westward on the ground from his Monument No. 4 the distance to his Monument No. 1 indicated on the map, had re-established his Monument No. 1 at the point thus ascertained, and erected there a concrete monument marked to show such re-establishment. In February, 1913, the President by an Executive Order [18] approved the

[16] No. 8, 37 Stat. 39.

[17] President's Proclamation, 37 Stat. 1723.

[18] No. 1716, February 25, 1913. This Order directed that a copy of the commissioners' reports, plat and field notes, should be deposited in the permanent archives of the General Land Office as a perpetual memorial of the existence and location of the boundary line.

reports of the commissioners, and confirmed and established their findings, conclusions and acts for the establishment and demarcation of the boundary lines between New Mexico and Texas.

The Clark Monument No. 1, as re-established by the Scott-Cockrell Commission, is almost exactly 3,000 feet west of Station 1; and if this is conclusive as to its original location, places the river bank in 1859 substantially in the position claimed by Texas. As to this, New Mexico contended that in re-establishing the Monument the Commission had mistaken Clark's Monument No. 3 for his Monument No. 4 and consequently started the measurement from a point 3,000 feet too far to the west; and further, that as the re-establishment was not made until after New Mexico had been admitted as a State, it was not bound thereby.

The master, in dealing with Clark's survey—as to which there was much conflicting evidence—and the re-establishment of Monument No. 1, found, as a matter of law, that New Mexico was bound by the Clark lines as re-established by the Commission and could not challenge the correctness of its acts, and that hence, in locating the boundary line extending southwardly from the 32nd parallel through the valley, the starting point on the parallel could not be fixed east of the re-established Monument. And he further found that it was shown by the evidence, as a matter of fact, that the location of Clark's Monument No. 1 did not coincide with that of Station 1, but was at a point 2783 feet west of that Station, 216.5 feet east of the point where the Monument had been re-established by the Commission, thereby showing that the river bank was at least 2783 feet west of the location claimed by the witnesses for New Mexico; that the theory that the Commission had measured from Monument No. 3 instead of Monument No. 4, was without basis; and that the location of Monument No. 1, either as found by

him or as fixed by the Commission, was utterly inconsistent with the location of the river claimed by New Mexico.

4. In support of its contention as to the location of the river, Texas further relied upon various old surveys, patents and maps, and the testimony of its engineers in regard thereto, as showing the true course of the river southwardly through the valley from the point where it crossed the parallel. These documents consisted mainly of the so-called Salazar-Diaz Survey of the Rio Grande, made in 1852 by Diaz, a Mexican engineer, by order of Salazar, the Mexican member of the Joint Boundary Commission under the Treaty of Guadalupe-Hidalgo;[19]—a survey made in 1860 and a resurvey made in 1886, by Texas surveyors, of a Mexican grant on which Texas reissued a patent in 1886;—surveys made by Texas surveyors between 1848 and 1873, several of which were bounded on the west by the river bank, on which Texas issued patents between 1860 and 1874;—maps of surveys made in 1852–1853 and 1855 under the direction of the American surveyor for the Joint Boundary Commission under the Treaty of Guadalupe-Hidalgo and the American member of the Joint Boundary Commission under the Gadsden Treaty, and agreed to by the Joint Commissions, which showed the course of the river;—and War Department maps of surveys made in 1854–1856 in the course of explorations for a railroad route to the Pacific Ocean, likewise showing the course of the river. And Texas also relied upon long acquiescence by the United States before the Territory of New Mexico had been admitted as a State.

The Salazar-Diaz Survey covered the course of the Rio Grande through all the area in dispute except in the extreme northern portion. The evidence of this Survey consisted of two copies of a document containing Diaz' memoranda and field notes. One was a copy of the

[19] 9 Stat. 922.

original document in the archives of the International Boundary Commission under the Convention of 1889,[20] which was authenticated by a certificate of the Mexican Commissioner. This was introduced in evidence by Texas, over the objection of New Mexico that the Commissioner had no authority to make such a certificate.[21] A few days later counsel for New Mexico stated that they would offer in evidence a copy of these memoranda and field notes properly certified by one of the departments of the Mexican Government. They later furnished counsel for Texas a copy certified by a government officer in the City of Mexico.[22] The copy so furnished was thereafter introduced by Texas, without objection; and engineers of both States were examined and cross-examined as to their work and calculations based on this copy, concerning the reproduction of the survey on the ground. Two years later, in 1918, on the day that the taking of testimony was closed by agreement, New Mexico moved to strike out both copies from the record on the ground that they were not so authenticated as to be admissible in evidence; and introduced evidence in support of this motion for the purpose of showing that there was not in fact any original of the document in the department in the City of Mexico as they had believed when they furnished the copy to the counsel for Texas.

We agree with the view of the master that the objections to the two copies were not well taken. The first was

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[20] 26 Stat. 1512.

[21] This copy also contained a calculation of courses that had been made from the field notes, in 1911, by an engineer for the International Boundary Commission. This calculation, which the master found to be inadmissible, played no part in the evidence in the case.

[22] This did not contain the engineer's calculation of courses, but contained a copy of Diaz' diary. Otherwise the memoranda and field notes were substantially the same as in the first copy.

admissible upon authentication by the Mexican Boundary Commissioner having proper custody of the original. See *United States* v. *Wiggins,* 14 Pet. 334, 346, and *United States* v. *Acosta,* 1 How. 24, 26. And under all the circumstances the motion to exclude the second copy came too late, apart from any question as to its proper authentication. See *Benson* v. *United States,* 146 U. S. 325, 333.

There was much conflict in the evidence of the engineers for New Mexico and Texas as to the location of the river as shown by the Salazar-Diaz Survey, which was described in the field notes by traverse from triangulation points; also as to the location of the Texas patent on the Mexican grant and other Texas surveys and patents. New Mexico also challenged the authenticity of the Salazar-Diaz Survey.

5. The master found from the evidence: That the Salazar-Diaz Survey was authentic; that the course of the river as surveyed in 1852 had been reproduced by the engineers for Texas, by traverse from the triangulation points, with substantial correctness, and that even if the engineers for New Mexico were correct in certain contentions, the resultant reproduction would not place the river anywhere near the location claimed by New Mexico;—

That the boundaries of the patent issued by Texas on the Mexican grant—which extended nearly across the entire valley—except possibly the river boundary, could be substantially identified on the ground, and by far the greater part of the land patented was west of the location of the river claimed by New Mexico;—

That, although according to New Mexico's contention as to the location of the river a large part of the Texas surveys for lands lying between the 32nd parallel and the Mexican grant claiming a frontage on the river, would be located in the sand-hills east of the valley, they were in fact located in the valley;—

That, although some of the Texas surveys for lands lying south of the Mexican grant and extending to the end of the valley, might, if exactly surveyed now, extend across the river and on the western bank, they claimed land lying, at least in part, west of the location of the river for which New Mexico contended, and that the western line of the lands claimed in the surveys and patents fairly corresponded, with minor variations, to the line of the river shown by the Salazar-Diaz Survey;—and

That the Salazar-Diaz Survey was corroborated by certain of the maps of the surveys made for the Joint Boundary Commissions and the War Department, and by a map accompanying Clark's survey of the 32nd parallel, and that all these maps—as well as certain other maps that had not been introduced in evidence, but of which he thought judicial notice might be taken—sustained the contention of Texas as to the course of the Rio Grande in 1850 and were inconsistent with the contention of New Mexico.

He further found that, for many years prior to the admission of New Mexico as a State in 1912, surveys were made by Texas surveyors and patents issued by Texas on substantially all the land in the area in dispute; [23] that the occupancy and physical possession of this land by Texas patentees and persons claiming under them, had been admitted by counsel at the hearing before him; that there was no evidence that from 1850 to 1911 the United States had issued any patents specifically covering lands east of the river as located by the Salazar-Diaz Survey, or conflicting with any of the patents issued by Texas; and

[23] New Mexico specifically alleged in its bill that Texas had attempted to assume jurisdiction over land lying to the west of the channel of the river as it existed in 1850, and had made grants, conveyances, patents and surveys thereof

that, for at least thirty years prior to the admission of the Territory of New Mexico as a State, the United States made no challenge of the claims to lands asserted by Texas and its citizens and, impliedly at least, recognized the practical line that had been established as the boundary between the Territory and Texas.

The master concluded on all the evidence that the allegations in New Mexico's bill as to the location and course of the Rio Grande " as it existed in the year 1850 " were not sustained, and that the river did not then flow on the eastern side of the valley as claimed by New Mexico; that its location and course in 1850 was, in general, as alleged in the cross-bill of Texas, and, in particular, that on the dates nearest to 1850 of which there was credible evidence it followed the course set forth in his report and described by reference to Clark's Monument No. 1, two Texas surveys made in 1860, a Texas survey made in 1849, and the Salazar-Diaz Survey of 1852, substantially as reproduced by the engineers for Texas; and that under the testimony the average width of the river should be estimated as 300 feet, and the middle of the channel fixed at 150 feet from the line of its east bank as shown by the Texas surveys, and 150 feet from the line of its west bank as shown by the Salazar-Diaz Survey.

6. We need not determine whether any of the documents referred to by the master that had not been introduced in evidence were properly the subject of judicial notice. Be that as it may, since New Mexico had no opportunity to introduce evidence in explanation or rebuttal of them, we have not considered them in reaching our own conclusions.

7. Upon the whole case we are satisfied that the master's finding as to the location of the river in 1850 is substantially correct, and fixes its course as accurately as is

possible after the lapse of more than three-quarters of a century. Without attempting to set out our reasons in detail, we conclude: That the testimony of the witnesses as to their recollection of the old river is far from satisfactory, and does not, in view of the other evidence in the case, sustain the burden of proof resting upon New Mexico;—that the greater weight of the evidence shows that Clark's Monument No. 1 did not coincide with Station 1, but was located at least 2783 feet west thereof, substantially as re-established by the Scott-Cockrell Commission;—that under the Joint Resolutions of February and August, 1911, preceding and conditioning the admission of New Mexico as a State, it is bound by the re-establishment of the Monument by the Commission and cannot question its accuracy;—that this necessarily extends the Clark boundary line along the 32nd parallel to the east bank of the river, at a point 600 feet west of the re-established Monument;—that, according to the greater weight of the evidence, the river, in 1850, or as near thereto as may now be determined, ran southwardly through the valley from the parallel, as shown by certain of the surveys, patents and maps relied on by Texas—especially the Salazar-Diaz Survey of 1852, the Texas surveys of 1849 and 1860, the maps of the surveys made in 1852–1855 for the Joint Boundary Commissions, and the Clark map of 1859—on the course and in the location set forth and described in the master's report;—and that this conclusion is reinforced by the tacit and long-continued acquiescence of the United States, while New Mexico was a Territory, in the claims of those holding the land in controversy under Texas surveys and patents, and the undisturbed possession of the Texas claimants. In short, we find that New Mexico has failed to sustain the burden of proof, and that the master's report is in accord with the greater weight of the evidence.

8. New Mexico's exceptions to so much of the report as deals with the location of the river in 1850, are accordingly overruled.

Accretions.

Both States have filed exceptions to the master's report in reference to accretions. Texas, on the one hand, insists that he was in error in reporting as the boundary line the location occupied by the river after it had been moved eastward from its location in 1850 by accretions. New Mexico, on the other hand, insists conditionally—that is, only if its exceptions as to the location in 1850 are not sustained—that in determining the accretions in the Country Club area the master fixed the line of such accretions in an indefinite manner and not far enough to the east. We find that the contention of Texas is well taken and the conditional contention of New Mexico is therefore immaterial.

This case is not one calling for the application of the general rule established in *Nebraska* v. *Iowa,* 143 U. S. 359, *Missouri* v. *Nebraska,* 196 U. S. 23, *Arkansas* v. *Tennessee,* 246 U. S. 158 and *Oklahoma* v. *Texas,* 260 U. S. 606, as to changes in State boundary lines caused by gradual accretions on a river boundary.

We reach this conclusion without reference to the fact that there were no issues under the pleadings as to accretions or changes in the boundary line since 1850, and without considering the propriety of permitting amendments to the pleadings, since in any event the outcome must be the same.

By the legislative compact created by an Act of Congress of September 9, 1850, and an Act of the Texas Legislature of November 25, 1850, the channel of the Rio Grande southwardly from its intersection with the 32nd parallel was established as a boundary between Texas and the territory of the United States. By this same Act of Congress the Territory of New Mexico was created, and

by that Act, supplemented by an Act of 1854 following the Gadsden Treaty, the channel of the river between the 32nd parallel and the parallel of 31 degrees 47 minutes became a boundary between the Territory of New Mexico and the State of Texas.[24]

New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its boundary ran "along said thirty-second parallel to the Rio Grande . . . as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, *following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty,* to the parallel of thirty-one degrees, forty-seven minutes north latitude." This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary; and Texas has also affirmed the same by its pleadings in this cause. Since the Constitution defined its boundary by the channel of the river as existing in 1850, and Congress admitted it as a State with that boundary, New Mexico, manifestly, cannot now question this limitation of its boundary or assert a claim to any land east of the line thus limited. And it was doubtless for this reason that New Mexico alleged in its pleadings and has consistently asserted throughout this litigation that the true boundary is the channel of the river as it existed in 1850.

The exceptions of Texas to so much of the master's report as deals with the question of accretions and fixes the boundary with reference thereto, are accordingly sustained; and the conditional exceptions of New Mexico to so much of the report as relates to accretions in the Country Club area, are overruled.

Conclusion.

Our conclusion on the entire case is that the boundary line between New Mexico and Texas in the area in dis-

[24]All these Acts are cited in Note 1, *supra*.

pute is the middle of the channel of the Rio Grande as it was located in 1850, extending southwardly from the parallel of 32 degrees north latitude to the parallel of 31 degrees 47 minutes, as found and described by the master in Section V (1) of his report; the intersection of the east bank of the river with the line of the 32nd parallel to be taken at a point 600 feet west from the Clark Monument No. 1 as re-established by the Scott-Cockrell Commission, and the middle line of the channel to be taken 150 feet from the east and west banks of the river, respectively, as found by the master.

It results that the bill of New Mexico must be dismissed; and that, under the cross-bill of Texas, the line above described must be decreed to be the boundary between the two States.

This boundary line should now be accurately surveyed and marked by a commissioner or commissioners to be appointed by the Court, whose report shall be subject to its approval.

The parties may submit within forty days the form of a decree to carry these conclusions into effect.

Bill dismissed and decree directed under cross-bill.

ROBINS DRY DOCK & REPAIR COMPANY *v.* FLINT ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 102. Argued December 1, 1927.—Decided December 12, 1927.

The owners of a vessel, remaining in their possession while time-chartered to the plaintiffs, docked her with the defendant under a provision of the charter for docking every six months and suspension of payment of hire by the plaintiffs until she was again ready for service. Defendant injured the vessel by negligence, causing delay, repaired her, settled with the owners and received a release of all their claims. Defendant had no notice of the charter until

the delay had begun. *Held,* that plaintiffs had no cause of action against the defendant for the loss of use of the vessel caused by the negligence, since,

(1) The docking contract between the owners and defendant was not for the plaintiffs' direct benefit. P. 307.

(2) No right of recovery could be based upon the ground that plaintiffs had a property interest in or right *in rem* against the ship. P. 308.

(3) A tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. P. 309.

(4) Plaintiffs, having no claim against the defendant in contract or in tort, could gain no standing on the theory that the owners, in addition to their own damages, might have recovered those of the plaintiffs, on the analogy of bailees, who, if allowed to recover full value, are chargeable over. P. 310.

13 F. (2d) 3, reversed.

CERTIORARI, 273 U. S. 679, to a decree of the Circuit Court of Appeals affirming a recovery of damages in the District Court, in a suit in admiralty brought by the respondents against the petitioner.

Mr. James K. Symmers, with whom *Mr. John C. Crawley* was on the brief, for petitioner.

The respondents have no cause of action upon the repair contract between the petitioner and the shipowners. *German Ins. Co.* v. *Home Water Co.,* 226 U. S. 220; *Nat. Bank* v. *Grand Lodge,* 98 U. S. 123; *Penna. Steel Co.* v. *Ry. Co.,* 198 Fed. 721.

The respondents had no property in the ship. *Leary* v. *U. S.,* 14 Wall. 607; *New Orleans, etc. Co.* v. *U. S.,* 239 U. S. 202; *Elliott Tug Co.* v. *Shipping Controller,* 1 K. B. 127; *Federated Coal Co.* v. *The King,* 2 K. B. 42; *Osaka Shosen Kaisha* v. *Lumber Co.,* 260 U. S. 490.

The injury to the ship was not a tort as to the respondents. *Savings Bank* v. *Ward,* 100 U. S. 195; *MacPherson* v. *Buick Co.,* 217 N. Y. 382; *The Federal No. 2,* 21 F. (2d) 313; *Dale* v. *Grant,* 34 N. J. L. 142; *Milton* v. *Story,* 11 Vt. 101; *Brink* v. *Ry. Co.* 160 Mo. 87; *Byrd* v. *English,* 117

Ga. 192; *Elliott Co.* v. *The Shipping Controller,* 1 K. B. 127; Pollock on Torts, 11th Ed. p. 556; *Simpson* v. *Thomson,* 3 App. Cas. 279; *Cattle* v. *Stockton Co.,* 10 Q. B. 453; *Remorquage* v. *Bennetts,* 1 K. B. 243; *Earl* v. *Lubbock,* 1 K. B., 255.

The petitioner was not unconditionally liable to the shipowners for the full market value of the vessel's use for fourteen days. As a contractor, the petitioner was answerable to the shipowners for the ensuing detention only if such detention was reasonably to be apprehended as a probable result of the petitioner's breaking the propeller, at the time when the petitioner contracted to install it. *Hadley* v. *Baxendale,* 26 Eng. L. & Eq. 398; *Howard* v. *Stillwell,* 139 U. S. 199; *Weston* v. *Boston & M. R. Co.,* 190 Mass. 298.

Even assuming that the shipowners might have recovered from the petitioner an amount equal to the full market value of the vessel's use during the entire period of detention, and that the petitioner, through its participation in the settlement with the shipowners, rendered itself liable as a tortfeasor to the charterers, it seems clear that such liability to the charterers would not be enforceable in admiralty. *The Eclipse,* 135 U. S. 599; *Kellum* v. *Emerson,* 14 Fed. Cas. 7669; Cf. *The Clavevesk,* 264 Fed. 276.

The fact that the shipowners might in other circumstances have suffered the charterers' loss, does not prevent the latter's damages from being legally remote.

Mr. Roscoe H. Hupper, with whom *Messrs. H. Alan Dawson* and *William J. Dean* were on the brief, for respondents.

The damages are not speculative or remote, but were limited to the respondents' share of the market value of the use of the steamer. *The Potomac,* 105 U. S. 630; *The Conqueror,* 166 U. S. 110; Sedgwick on Damages, 9th ed. § 593.

By making payment to the owner the petitioner recognized its liability at least to the extent of the owner's share in the market value of the use (limited by the charter).

Recovery of loss from the owner was not successful, liability being denied on the ground that the owner performed its full duty under the charter by selecting a repair yard of good repute. *The Bjornefjord,* 271 Fed. 682.

The relation of the respondents was such as to support a recovery of damages based on their loss of use during the period of detention caused by the petitioner's negligence.

The contract for use of a vessel is property, just as is a contract for construction. *Brooks-Scanlon Corp.* v. *U. S.,* 265 U. S. 106.

The time-charterer's operations as receiver of cargo can also subject the ship to liens. *The Capitaine Faure,* 10 F. (2d) 950, certiorari denied, 271 U. S. 684.

The relation was such as to make them the carriers of such cargoes as should be loaded on the vessel. *The Centurion,* 57 Fed. 412; *Olsen* v. *U. S. Shipping Co.,* 213 Fed. 18.

Many decisions have allowed recovery by a time-charterer without basing the same on derivative right through the owner. *The Aquitania,* 279 Fed. 239; *The Beaver,* 219 Fed. 134; *Hines* v. *Sangstad S. S. Co.,* 266 Fed. 502; *The Santona,* 152 Fed. 516.

Recovery is proper on the ground that the respondents were beneficiaries of the shipowner's contract with the petitioner for dry docking and repairing the steamer. *Vrooman* v. *Turner,* 69 N. Y. 280; *Strong* v. *American Fence Co.,* 245 N. Y. 48; *Lawrence* v. *Fox,* 20 N. Y. 268; *Seaver* v. *Ransom,* 224 N. Y. 233. Distinguishing, *German Ins. Co.* v. *Home Co.,* 226 U. S. 220; *Johns* v. *Wilson,* 180 U. S. 440; *Nat. Bank* v. *Grand Lodge,* 98 U. S., 123.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a libel by time charterers of the steamship Bjornefjord against the Dry Dock Company to recover for the loss of use of the steamer between August 1 and August 15, 1917. The libellants recovered in both Courts below. 13 Fed. (2d) 3. A writ of certiorari was granted by this Court. 273 U. S. 679.

By the terms of the charter party the steamer was to be docked at least once in every six months, and payment of the hire was to be suspended until she was again in proper state for service. In accordance with these terms the vessel was delivered to the petitioner and docked, and while there the propeller was so injured by the petitioner's negligence that a new one had to be put in, thus causing the delay for which this suit is brought. The petitioner seems to have had no notice of the charter party until the delay had begun, but on August 10, 1917, was formally advised by the respondents that they should hold it liable. It settled with the owners on December 7 1917, and received a release of all their claims.

The present libel "in a cause of contract and damage" seems to have been brought in reliance upon an allegation that the contract for dry docking between the petitioner and the owners "was made for the benefit of the libellants and was incidental to the aforesaid charter party" &c. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract "or in any respect beneficiaries" and were not entitled to sue for a breach of it "even under the most liberal rules that permit third parties to sue on a contract made for their benefit." 13 F. (2d) 4. "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit." *German Alliance Insurance Co.* v.

Home Water Supply Co., 226 U. S. 220, 230. Although the respondents still somewhat faintly argue the contrary, this question seems to us to need no more words. But as the case has been discussed here and below without much regard to the pleadings we proceed to consider the other grounds upon which it has been thought that a recovery could be maintained.

The District Court allowed recovery on the ground that the respondents had a "property right" in the vessel, although it is not argued that there was a demise, and the owners remained in possession. This notion also is repudiated by the Circuit Court of Appeals and rightly. The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship. *Leary* v. *United States*, 14 Wall. 607. *New Orleans-Belize Royal Mail & Central American Steamship Co.* v. *United States*, 239 U. S. 202.

Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons, as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to

bring about a breach of contract may give rise to a cause of action, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *Savings Bank* v. *Ward*, 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller*, [1922] 1 K. B. 127, 139, 140. *Byrd* v. *English*, 117 Ga. 192. *The Federal No. 2*, 21 F. (2d) 313.

The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would be done to allow the respondents to recover their share by direct suit. But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents. The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not there is no analogy to

the present case when the owner recovers upon a contract for damage and delay. *The Winkfield,* [1902] P. 42. *Brewster* v. *Warner,* 136 Mass. 57, 59.

Decree reversed.

GAMBINO ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 226. Argued October 12, 13, 1927.—Decided December 12, 1927.

1. The term "any officer of the law" in § 26, Title II of the National Prohibition Act, refers only to federal officers. P. 313.
2. If it appears from the evidence or from facts of which the Court will take judicial notice, that, in making a search and seizure, state officers were acting solely on behalf of the United States, evidence thus obtained is inadmissible in a prosecution in a federal court if the circumstances of the search and seizure were such as to render it unlawful. P. 314.
3. Defendants were arrested by New York State troopers, their automobile (while occupied by one of them and therefore within the protection accorded to his person) was searched without a warrant, intoxicating liquor found therein was seized, and defendants and liquor were immediately turned over to federal authorities for prosecution under the National Prohibition Act. The troopers acted without probable cause, and made the arrest, search and seizure solely on behalf of the United States. *Held,* that the admission in evidence of the liquor in such prosecution violated the Fourth and Fifth Amendments. P. 316.
4. A conviction in a federal court resting wholly upon evidence obtained through a violation of the defendants' constitutional rights may be reversed although the point was not properly presented in the courts below. P. 319.

16 F. (2d) 1016, reversed.

CERTIORARI, 274 U. S. 733, to a judgment of the Circuit Court of Appeals, affirming a conviction in the District Court for conspiracy to import and transport liquor in violation of the National Prohibition Act.

Mr. Irving K. Baxter for petitioners.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell,* and *Mr. Norman J. Morrisson,* Attorney in the Department of Justice, were on the brief, for the United States.

State officers, acting independently, are not agents of the United States, and if they obtained evidence illegally, it was nevertheless admissible in the prosecution in a federal court.

It is urged that the state officers are made agents of the United States for the purpose of enforcing the National Prohibition Act and that, under a mandate from Congress, it was their duty to enforce that Act. This claim is predicated upon § 26, Title II, of the National Prohibition Act and particularly upon the words " any officer of the law." *U. S.* v. *Story,* 294 Fed. 517, the first decision construing this phase of § 26, concludes that Congress contemplated the enforcement of the National Prohibition Act through state officers as well as through federal officers. But the *Story* case stands alone on this point. Though they have considered it, other lower federal courts have refused to follow that conclusion. *U. S.* v. *Loomis,* 297 Fed. 359; *The Ray of Block Island,* 7 F. (2d) 189, affirmed, 11 F. (2d) 522; *Dodge* v. *U. S.,* 272 U. S. 530.

All that was done by officers of the United States in this case was done long after the seizure had been completed. Acceptance of the things seized was not an act which deprived petitioners of any right under the Fourth and Fifth Amendments. The Government might, with equal propriety, have allowed the seized articles to remain with the state officers and later secured their production by a *subpœna duces tecum.* Neither course would have encountered constitutional objection. *Burdeau* v. *McDowell,* 256 U. S. 465. Certainly the acceptance of this property by the government officer was not a ratification of an unconstitutional act, for the arresting officers, acting independently of federal agents, did not

have the capacity to commit an act violative of the Fourth and Fifth Amendments. It being well established that these Amendments do not apply to state officers, the act of the government officers, if it be a ratification of anything, must be considered as an adoption of an act constitutionally unobjectionable. *Robinson* v. *U. S.*, 292 Fed. 683.

Since there was no federal coöperation in the making of this search and seizure, the rule announced in *Byars* v. *U. S.*, 273 U. S. 28, does not apply. It appears, therefore, that this case falls within the rule, long regarded as settled, that the use by prosecuting officers of evidence illegally acquired by others than government officers does not necessarily violate the Constitution of the United States, nor affect the admissibility of such evidence in a federal court. *Weeks* v. *U. S.*, 232 U. S. 383; *Adams* v. *New York*, 192 U. S. 585; *Burdeau* v. *McDowell*, 256 U. S. 465; *McGuire* v. *U. S.*, 273 U. S. 95. See also, *Twining* v. *N. J.*, 211 U. S. 78.

Under the circumstances of this case, absent any participation by federal officers, the District Court was under no obligation to inquire into the legality of the acts of the state officers. *McGrew* v. *U. S.*, 281 Fed. 809; *Coates* v. *U. S.*, 290 Fed. 134; *Schroeder* v. *U. S.*, 7 F. (2d) 60; *Elam* v. *U S.*, 7 F. (2d) 887.

There was probable cause for the search.

Mr. Justice Brandeis delivered the opinion of the Court.

On August 1, 1924, Gambino and Lima were arrested by two New York state troopers, near the Canadian border; their automobile (while occupied by Gambino and therefore within the protection accorded to his person) was searched without a warrant; and intoxicating liquor found therein was seized. They, the liquor and other

property taken were immediately turned over to a federal deputy collector of customs for prosecution in the federal court for northern New York. There, the defendants were promptly indicted for conspiracy to import and transport liquor in violation of the National Prohibition Act. They moved seasonably, in advance of the trial and again later, for the suppression of the liquor as evidence and for its return, on the ground that the arrest, the search and the seizure were without a warrant and without probable cause, in violation of the Fourth, Fifth and Sixth Amendments of the Federal Constitution. The motion was denied; the evidence was introduced at the trial; the defendants were found guilty; and they were sentenced to fine and imprisonment. The Court of Appeals affirmed the judgment. Neither court delivered an opinion. This Court granted a writ of certiorari, 274 U. S. 733.

The Government contends that the evidence was admissible, because there was probable cause, *Carroll* v. *United States,* 267 U. S. 132, 153, and also because it was not shown that the state troopers were, at the time of the arrest, search and seizure, agents of the United States. The defendants contend that there was not probable cause and that the state troopers are to be deemed agents of the United States, because § 26 of Title II of the National Prohibition Act imposes the duty of arrest and seizure where liquor is being illegally transported, not only upon the Commissioner of Internal Revenue, his assistants and inspectors, but also upon "any officer of the law." We are of opinion on the facts, which it is unnecessary to detail, that there was not probable cause. We are also of opinion that the term "any officer of the law" used in § 26 refers only to federal officers, and that the troopers were not, at the time of the arrest and seizure, agents of the United States. Compare *Dodge* v. *United States,* 272 U. S. 530, 531.

But the National Prohibition Act, October 28, 1919, c. 85, Title II, § 2, 41 Stat. 305, 308, contemplated some coöperation between the state and the federal governments in the enforcement of the Act. Thus, § 2 made applicable the provisions of § 1014 of the Revised Statutes whereby state magistrates were authorized "agreeably to the usual mode of process against offenders in such State, and at the expense of the United States," to arrest and imprison, or bail, offenders against any law of the United States for trial before the federal court, and to require "recognizances of witnesses for their appearance to testify in the case." Section 2 also gave specific authority to the state magistrates to issue search warrants under the limitations fixed by the federal statutes. Act of June 15, 1917, c. 30, Title XI, 40 Stat. 217, 228. Evidence obtained through wrongful search and seizure by state officers who are coöperating with federal officials must be excluded. See *Flagg* v. *United States,* 233 Fed. 481, 483, approved in *Silverthorne* v. *United States,* 251 U. S. 385, 392. In *Byars* v. *United States,* 273 U. S. 28, 34, evidence obtained by state officers through search and seizure made without a warrant and without probable cause, but in the presence of a federal official, was held inadmissible. The question here is whether, although the state troopers were not agents of the United States, their relation to the federal prosecution was such as to require the exclusion of the evidence wrongfully obtained.

The Mullan-Gage Law—the state prohibition act—had been repealed in 1923. Act of June 1, 1923, c. 871, 1923 N. Y. Laws, p. 1690. There is no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had. Unless the troopers were authorized to make the arrest, search and seizure because they were aiding in the enforcement of a law of the United States, their action

would clearly have been wrongful even if they had had positive knowledge that the defendants were violating the federal law. No federal official was present at the search and seizure; and the defendants made no attempt to establish that the particular search and seizure was made in coöperation with federal officials. But facts of which we take judicial notice, compare *Tempel* v. *United States*, 248 U. S. 121, 130, make it clear that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act; and that they made this arrest, search and seizure, in the performance of that supposed duty, solely for the purpose of aiding in the federal prosecution.

In the memorandum filed by the Governor approving the Act which repealed the Mullan-Gage law, he declared that all peace officers, thus including state troopers, are required to aid in the enforcement of the federal law "with as much force and as much vigor as they would enforce any State law or local ordinance"; and that the repeal of the Mullan-Gage law should make no difference in their action, except that thereafter the peace officers must take the offender to the federal court for prosecution.[1] Aid so given was accepted and acted on by the federal officials.[2]

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[1] Memorandum filed with Assembly Bill, Introductory No. 1614, Printed No. 1817, p. 2. See also Messages of Jan. 2, 1924, N. Y. Leg. Doc., 147th Sess., 1924, No. 3, p. 40, and Jan. 7, 1925, N. Y. Leg. Doc., 148th Sess. 1925, No. 3, pp. 39–40; Report of the Department of State Police for 1924, N. Y. Leg. Doc., 148th Sess., 1925, No. 50, p. 13.

[2] Immediately after the repeal of the Mullan-Gage law the Federal Prohibition Director in New York City announced that he would call upon the Superintendent of State Troopers, the sheriff of each county, and every chief of police to aid in arresting violators of the National Prohibition Act. In February, 1924, he attended a conference of state and federal enforcement agencies at Albany, where he reiterated the need for co-operation. That arrests for violation of the Volstead Act in northern New York were commonly made by state troopers, during 1924, see testimony of federal prohibition agents in Hearings before the Committee on the Judiciary of the House of Representatives,

It appears that one of the troopers who made the arrest and seizure here in question had been stationed at the Canadian border for eighteen months prior thereto, the greater part of that period being after the repeal of the Mullan-Gage law. It was also shown that immediately after the arrest and seizure, the defendants, their car and the liquor were, after they had been taken to the committing magistrate, turned over to the federal officers. In view of these facts, the statement, in the affidavit of one of the troopers, that at the time of the arrest and search "there were no federal officers present, and that we were not working in conjunction with federal officers" must be taken to mean merely that the specific arrest and search was not directly participated in by any federal officer.

We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such cooperation, as by the state officers' acting under direction of the federal officials. Compare *Silverthorne* v. *United States*, 251 U. S. 385, 392. The prosecution thereupon instituted by the federal au-

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69th Cong., 2d Sess., on H. Res. 398 and H. Res. 415, pp. 37, 71, 79, 88, 100. For the part played by the New York City police in enforcement of the National Prohibition Act long after the repeal of the Mullan-Gage law, see testimony of the United States Attorney for the Southern District of New York, Hearings before the Subcommittee of the Committee on the Judiciary, U. S. Senate, 69th Cong., 1st Sess., on S. 33, S. 34, S. 591, S. 592, S. 3118, S. J. Res. 34, S. J. Res. 81, S. J. Res. 85, S. 3823, S. 3411, and S. 3891, pp. 96, 99, 103, 107.

thorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to enquire.

The conclusion here reached is not in conflict with any of the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes. For in none of those cases did it appear that the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws. In *Weeks* v. *United States,* 232 U. S. 383, the papers not ordered returned had been obtained by a policeman who searched the defendant's home after his arrest by another state officer. Pp. 386, 398. It was not shown there that either the arrest or the search was made solely for the purpose of aiding in the prosecution of the federal offense. A law of the State made criminal the acts with which the defendant was charged;[3] and the seizure may have been made in enforcing the state law. In *Center* v. *United States,* 267 U. S. 575 (*Per Curiam*), the liquor admitted in evidence had been taken by the state officials for immediate use as evidence in the state courts. Proceedings against the defendant, the car and the liquor were instituted there four months before the prosecution in the federal court was begun. In *Dodge* v. *United States,* 272 U. S. 530, a libel to forfeit a vessel which had originally been seized by a state officer, the question presented was one of jurisdiction. The Court in sustaining the jurisdiction, although the original seizure had been made by the state officer without authority, said, p. 532: "The exclusion of evidence obtained by an unlawful search and seiz-

[3] Missouri Revised Statutes, 1909, §§ 4770, 4771.

ure stands on a different ground." In *Burdeau* v. *McDowell,* 256 U. S. 465, the books and papers admitted had been taken by private detectives. The District Court ordered the return "solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return." P. 472. This Court based its reversal on the finding that "the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company." P. 475.

There have been many instances in which the lower federal courts have admitted evidence obtained by state officers through wrongful search and seizure, but only three reported cases have been found in which it could have been seriously contended, in view of the law of the State and the facts appearing in the opinion, that the search and seizure had been made solely for the purpose of aiding in the enforcement of the federal law. *Schroeder* v. *United States,* 7 F. (2d) 60; *Greenberg* v. *United States,* 7 F. (2d) 65; *Katz* v. *United States,* 7 F. (2d) 67. These cases, like the present one, were decisions of the Court of Appeals for the Second Circuit, and involved searches and seizures made by officers of New York subsequent to the repeal of the Mullan-Gage law.[4] An examination of the record in the *Schroeder* case discloses that the sergeant of police who made the search and seizure was not acting solely to enforce the National Prohibition Act. He was a confidential investigator, charged with the task of detecting cor-

[4] Compare *United States* v. *Bush,* 269 Fed. 455; *In re Schuetze,* 299 Fed. 827; *United States* v. *Dossi,* 12 F. (2d) 956; and *United States* v. *Costanzo,* 13 F. (2d) 259—in all of which the District Court for Western New York refused to permit the use of evidence obtained by state officials, on a finding that they were acting in coöperation with the federal authorities.

ruption and other derelictions of duty on the part of police officers; the defendant was likewise a police officer; and the sergeant, on making the search and seizure, informed the defendant that he was acting in pursuance of his regular duties. These facts were relied upon by the Government in both the trial and the appellate court. In the *Greenberg* and *Katz* cases the situation was wholly different. The Court of Appeals, failing to note the difference, treated its decision in the *Schroeder* case as controlling, and did not give adequate consideration to the peculiar relation borne in New York, then as now, by state officers to federal prohibition enforcement, although the point was made by the defendant and a decision thereon was urgently sought by the United States Attorney.

The record in the case at bar does not show that the relation between the state troopers and the federal agencies for prohibition enforcement was called by counsel to the attention of the court. But as the conviction of these defendants rests wholly upon evidence obtained by invasion of their constitutional rights, we are of opinion that the judgment should be reversed and the case remanded for further proceedings. Compare *Wiborg* v. *United States,* 163 U. S. 632, 658–660; *Clyatt* v. *United States,* 197 U. S. 207, 221–222.

Reversed.

TEMCO ELECTRIC MOTOR COMPANY *v.* APCO MANUFACTURING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 37. Argued October 18, 1927.—Decided January 3, 1928.

1. Large public demand for, and commercial success of, a patented article is evidence of invention. P. 324.
2. The specifications and drawings of a patent may be referred to as an aid in construing a claim. P. 330.

3. A claim in a patent should be construed liberally, so as to uphold and not destroy the right of the inventor. P. 330.
4. An improver who appropriates, without license, the basic patent of another, is an infringer and suable as such. P. 328.
5. Patentee who applied for a second patent as an improvement "over" the first, characterizing the new device as different in mechanical construction and functional results, *held* not estopped to insist on the old invention as against one who secured patent to the improvement through interference proceedings. P. 328.
6. The Thompson patent, No. 1,072,791, issued September 9, 1913, for a shock-absorber attachable to motor cars which have their leaf springs above and along their axles and attached at the middle to the car body above and at the ends to the axles near the wheels, is valid, including claim No. 3, and is infringed by defendant's device, made under patent No. 1,279,035, granted to Storrie, September 17, 1918. P. 326.

   The Thompson patent is for a combination of old elements, consisting (1) of a spiral spring, resting upon and in part guided by (2) a stanchion, attached to the top of the axle near the wheel; (3) a hanger bearing on the top of the spiral spring, in one form encasing it, in another passing through it, capable of moving up and down with the spring and attached below to (6) a link attached in turn to (7) the end of the leaf spring. The gist of the invention (besides its peculiar application as a separable part to the Ford car) is in the arrangement of its parts, so that all shocks and vibrations from the wheels are imparted first to the spiral springs before reaching the leaf springs, and thus are the more effectively absorbed or dampened due to the different responses of the two kinds of springs.
7. The radius link employed in the Storrie patent is a mere improvement on the Thompson combination. P. 325.

11 F. (2d) 109, reversed.

CERTIORARI, 271 U. S. 653, to a decree of the Circuit Court of Appeals which reversed a decree of the District Court sustaining, on three claims, the above named petitioner's patent in its suit for infringement. Another of the patent claims, No. 3, was held void by the District Court, a ruling which was sustained by the court below on petitioner's cross appeal.

Messrs. H. A. Toulmin and *H. A. Toulmin, Jr.*, with whom *Messrs. J. J. Spalding, H. MacDougald* and *J. A. Sibley* were on the brief, for petitioner.

Mr. Clifford L. Anderson, with whom *Messrs. James A. Branch* and *Moseley A. Keller* were on the brief, for respondent.

Mr. Chief Justice Taft delivered the opinion of the Court.

The Temco Electric Company, a corporation of the State of Ohio, filed this bill in equity against the Apco Manufacturing Company, a corporation of the State of Rhode Island, charging that the Apco Company had wronged the Temco Company by infringement of a patent for a shock absorber fitted for a Ford motor car, issued to Ralph P. and Wm. S. Thompson, assignors of one-third to Oliver P. Edwards, and assigned by them to the Temco Company and owned by it. The Apco Company answered denying the validity of the patent and its infringement, averring that it was inoperative and that the shock absorber which the Apco Company was making was made under a patent to one William Storrie, applied for March 18th, granted September 17, 1918, and numbered 1,279,035. The answer further set out the names of certain patents which were said to be anticipations of the patent upon which the suit was brought.

The district court held that the patent was a very narrow patent, and that claim No. 3 was invalid because it lacked words of description enough to make it operative. Deferring, however, to the decision of the district judges and of the Circuit Court of Appeals of the Sixth Circuit, it sustained three other claims of the patent but declined to grant a preliminary injunction. Though of opinion that the infringement had not been shown, nevertheless it en-

tered a decree in favor of the appellee out of deference to two decisions of the Circuit Court of Appeals, *K-W Ignition Company* v. *Temco Electric Motor Company,* 243 Fed. 588, and the same case reported again in 283 Fed. 873. The Circuit Court of Appeals of the Fifth Circuit declined to follow the two decisions, of the Circuit Court of Appeals of the Sixth Circuit, and reversed the judgment of the district court. There had been a cross appeal brought by the appellee to reverse the district court in its holding that the third claim was invalid, and that cross appeal was denied, 11 Fed. (2d) 109. The case has been brought here by certiorari. 271 U. S. 653.

The patent sued on was issued to Ralph P. Thompson and William S. Thompson, of Leipsic, Ohio, assignors of one-third to Oliver P. Edwards, of Leipsic, Ohio. The application was filed October 10, 1912, and the patent was issued September 9, 1913, and numbered 1,072,791, and has since been assigned by the patentees to the Temco Company. The object of the patentees was to provide a shock absorber which would make riding in an automobile easy. They professed to accomplish this by supplying a set of quick-acting coiled springs in connection with the set of slow-acting and friction-retarded leaf springs originally built into the vehicle. The compression and recoil of the two sets of springs occurred at different times, in consequence of which their respective pulsations were not synchronous. The result was said, in the specifications, to be that the shock to the road wheel and axle was first absorbed by the coiled spring, and therefrom was transmitted to the body of the car and to the occupants through the slow-acting leaf spring. As the compression and recoil of the leaf spring were not the same as those of the coiled spring, the recoil of the coiled spring began to take place before the full effect of the shock to the road wheel could be transmitted through the leaf spring. This see-sawing action, as it were, between the quick-acting coiled spring

and the slow-acting leaf spring, the specifications said, caused a large portion of the effect from vibrations to be nullified by the action of one and reaction of the other of these springs taking place simultaneously, thus absorbing within the spring element the sharper vibrations. The device was intended to be specially adapted for attachment to Ford automobiles. Its availability was claimed to be such that the owner of a Ford car, without the services of a mechanic and without disturbing the operation or construction of the car, might, with slight instruction, remove the usual hanger which supported each end of each leaf spring and insert in its stead the plaintiff's attachment.

The absorber consisted of an upright metal guide, whose lower end was rigidly attached to the car axle, and provided a platform for the lower end of a coiled or torsion spring, inclosed in a cylindrical metal casing or hanger, bearing against and supported by the upper end of the coiled spring, and so capable of upward and downward sliding movement on the guides, the stanchions or guides being adapted to maintain the vertical direction of the sliding movement of the absorber or torsional spring, and to limit the end movements of the leaf springs along the axle.

When the patent was issued there was a great demand to purchase the device and use it, and under the patentees, or under the K-W Ignition Company, which had a contract with the patentees, there were made and sold upwards of 134,000 sets of the shock absorbers, and about $2,250,000 was from time to time paid to the patentees for these absorbers, so that from 1912 for ten years or more a very large business was done in the sale and use of the patented device. There was litigation over it, especially in the districts of the Sixth Circuit, where the validity of the patent was generally sustained, the first case having been heard by a former Justice of this Court while a dis-

trict judge of the Northern District of Ohio. His opinion is recorded in the record. The case involved not only the validity of the patent, which after some hesitation he sustained because of its general adoption and success, but also presented a question whether the defendants in that case, the K-W Ignition Company, were not so bound by contract with the patentees as to estop them from defending against the patent. The district judge held, however, that the contract had expired and the obligations growing out of it had also expired, so that the issue tried was that of the validity of the patent. The district court's decree was affirmed by the Court of Appeals and the case was sent back for an accounting, and an accounting was had against the defendant in that case and a judgment given for $292,938 against the K-W Ignition Company, which was a defendant there. In the present suit the bill set up this litigation in Ohio as evidence of the validity of the patent, but a straight issue of validity was also made and all the defenses known were advanced.

The district judge in Ohio in the *K-W Ignition* case was affected in his decision, that the Thompson patent involved invention, by the way in which the public eagerly took it and its marked success, and so, indeed, was the Circuit Court of Appeals of the Sixth Circuit. So are we.

The attack now made upon the patent is that it has been proved to be ineffective by ten years' actual use, some injuries to the shock absorbers resulting from striking of the parts of the motor machine against the metal guides and cylindrical metal hangers in which the torsional spring is moved up and down. It appears that the real owners of the patent, realizing that there were defects in the operation of the absorber that should be remedied, applied to the Patent Office for a patent which should substitute for the stanchions or guides, on which the hanger around the torsional spring moved up and down in a vertical direction, a fixed radius link. The torsional spring of the

patent enclosed within the casing or hanger attached to the upright guide did not, in moving or sliding up and down, retain a vertical direction but was sometimes tilted over by the weight of the car and its load. The change proposed, in regard to this, was that while the spring should be placed outside the upright or stanchion at the bottom of the spring, the upright stem or guide or stanchion inside the spring should be maintained in a vertical position by the addition of a radius link united to another by a toggle joint which fixed the guide rigidly and would hold the coil spring up permanently in a vertical position. This permitted a widening of the coil spring at the bottom so as to make it conical and gave the spring more stability in its vertical position. The difference between a conical coil spring and one that is not conical does not make the two structures different in any respect but in degree of stability only.

The proposal of the plaintiff patentees to remove a defect by the substitution of the radius link for the metal guide and casing and hanger led to an interference proceeding with one William Storrie who claimed to have hit upon this change first, and in that interference proceeding in the Patent Office, Storrie was given a patent for the absorber with that radius link. Except for the radius link there is no difference in operation and result. The springs in a Ford car equipped with the defendant's device receive the shocks in the same order, operate in the same manner and produce the same results as those in a Ford car on which the springs of the plaintiff's patent are used. The function which the casing of the torsional spring and the hanger perform is exactly the same as that of the torsional spring and the radius link introduced in the Storrie patent under which the answer and the facts show the defendant's device was licensed and operates.

Storrie as patentee said in his specifications that his invention related to means for absorbing the vibrations

and shocks in vehicle springs to such an extent as not to cause annoyance to the rider and strain to the springs of the vehicle, which would tend to cause such springs to crack or otherwise become disabled; that the invention provided a shock absorber embodying an expansible helical spring and supporting means therefor of novel formation, one of such supports being secured to the axle and the other being shackled or otherwise attached to the vehicle spring, the parts being arranged to control the vibrations or shocks not taken up quick enough by the main spring and thereby overcome the objectionable features therein mentioned. And then follow twelve different claims, most of which refer to a radius link pivoted to the support between the torsional spring and the main or laminated spring of the vehicle.

The claim made for the invention is that the real gist of it is in the arrangement of the parts, all of which were old, so that the first vibration and shock would be taken up from the axle by the torsional spring, and then, having been divided up into vibrations, would be communicated through the torsional spring and the absorber to the leaf spring and "dampened down," as the expression is, by its slower action, so as really to take up and absorb and make to disappear the shocks otherwise directly communicated from the road and the axle to the leaf spring. It is argued that, as these were all old parts, there was nothing new in the patent. We have examined the art with a view to considering that particular point. We think that the theory, that the Thompson patent had and has its real value in the function of the torsional spring directly to take up all the vibrations from the road and axle and quickly to divide them for the dampening effect of the slow moving leaf spring of the car, was a sound one. There have been citations of early patents showing previous attempts of the same kind, but we have not been pointed to one in which the torsional spring was so

arranged as to take all the road vibrations and divide them up before reaching the main car spring, except those which have come after the Thompson original patent. This is true of the Bussing, whether German, English or French patents, the Peugeot patent and the Cosset patent. It is true that by taking some of these structures or devices, notably the Bussing English patent, it may be possible to show how, by turning over on its back the specified device, the torsional spring could be made partly and ineffectively to perform this function, but as described in this or other cited patents there is no suggestion or recommendation of the arrangement in Thompsons'. They—all of them—use the main or leaf spring to take directly all or part of the vibrations from the axle and rely on the torsional spring to soften vibrations after they have passed or are passing through the main spring. The leaf spring in the Warner patent not only takes the greater road shocks directly but the entire spring arrangement is primarily built and put in at the factory while the axle is split into two parts, and the device is not made a separate or separable part, a feature which is an important and needed advantage to adapt the absorber to use in a Ford car.

We may properly note, as bearing upon the issue whether there was something substantial in the elaborated claim of the Thompson specifications, that the defendant below called as a witness Mr. Storrie and that upon cross examination he said that the defendant's device was within the Storrie patent, and he made it clear that without the torsional spring to divide and neutralize the vibrations from the axle and ground, the good effect of the leaf spring to "dampen out" the vibrations from the road could not be gained.

With respect to the Storrie patent, it is said that the patent in suit is not broad enough to justify an allowance of equivalents which would make the radius link an equivalent to the casing and hanger of the Thompson absorber.

It is urged that if it is not an equivalent, it is at least an improvement on the Thompson patent in suit and that this is what Thompson was seeking when the interference proceedings were had. It was upon that theory, that the Storrie patent was an improvement on the Thompson patent, that the Circuit Court of Appeals of the Sixth Circuit in the suit between the Temco Company and the K. W. Ignition Company decided that it could allow only recovery for royalties and not for profits, 283 Fed. 873, 876, 877. It is well established that an improver can not appropriate the basic patent of another and that the improver without a license is an infringer and may be sued as such. *Cochrane* v. *Deener,* 94 U. S. 780, 787; *Cantrell* v. *Wallick,* 117 U. S. 689, 694; *Yancey* v. *Enright,* 230 Fed. 641, 647; *Reed* v. *Hughes Tool Company,* 261 Fed. 192, 194.

We cannot concur with the district judge in this case or with the Circuit Court of Appeals of the Fifth Circuit in the conclusion that there was no merit in this patent, when its usefulness was demonstrated by ten years' use in such large numbers and by such profitable business. We must consider that the Storrie patent was really an appropriation of the original design of the Thompson patent whether it be, as we think it was, a patentable improvement thereon or the mere equivalent of the casing and hanger.

It is argued that an estoppel works as against the Temco Company by the action of one of the Thompsons, an assignor of its patent, because, in applying for the second patent in what turned out to be the interference proceeding, he had said that the radius link device which was applied for related to an improvement "over" the construction disclosed in the original patent granted to them. If Thompson had said it was an improvement "upon" it would have been satisfactory, but the word "over" is supposed to indicate that he was making an

application for a different patent. This is too fine a turn in language. In attempting to distinguish the new invention which he was seeking to have patented, he had said that the claims of the new patent were "obviously different in mechanical construction and functional results." This is said to estop the plaintiff from claiming that the Storrie radius link, which won in the interference proceeding, is only an improvement on the patent in suit as the basic patent upon which the Storrie patent was an improvement. But it was said in the Thompson application for a second patent in the Patent Office that the invention sought was of the general type disclosed, possessing certain advantages not possessed by the construction of the prior patent, and it was specifically stated therein that the radius link form was an improvement over a construction disclosed in the first Thompson patent, No. 1,072,791.

We have had to depend for knowledge of the contents of the application by Thompson for his second patent on the quotations in the briefs. This record has been so badly prepared and so much has been omitted in the printing that we should really reject the argument by the defendants as to estoppel altogether because the record as printed contains nothing upon which it can be based.

The district court and the Circuit Court of Appeals in this case held that claim No. 3 of the patent in suit was void because inoperative and having no description upon which it could be properly used as a claim. The claim is as follows:

"In automobile construction, wherein coiled springs are used auxiliary to leaf springs for absorbing shock to the road wheels, the combination of upright stanchions with the axle of the ground wheels, said stanchions being attached to the outer ends of said axle, leaf springs extending above the axle and between the stanchions, and supporting the chassis frame, the said stanchions being

adapted to limit the end motion of the leaf springs and thereby prevent side sway of the chassis frame, hangers for the outer ends of said leaf springs, said hangers having a vertical movement and being guided therein by said stanchions, and coiled springs interposed between said leaf spring hangers and said axle of the ground wheels."

The district court in its opinion said: "For want of any statement as to how the leaf spring and helical spring are to be connected to and guided by the stanchions, I think Claim 3 is incomplete and void."

The Circuit Court of Appeals of the Fifth Circuit said of the claim: "Appellee [the petitioner] has filed a cross-appeal and insists that the claim which the district court disallowed is valid. That claim is about as vague as it could be made. As pointed out by the district judge it fails to specify the means by which the leaf and helical springs can be connected to and guided by the stanchion. To sustain a claim as general as this is would be to allow a patent for a 'result and not for the mechanism producing it'."

Reading the claim with the specifications and the drawings, which are both clear (*Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388, 394) its addition to the combination of coiled springs interposed between the leaf spring hangers having vertical movement and guided by stanchions, comprehends the link as shown in the drawings, or any suitable connection between each leaf spring and its hanger and casing surrounding the coiled spring which is interposed between the leaf spring and the axle and ground wheel. It does not seem to us that the claim is vague; nor do we find nullifying incompleteness in it. *Turrill* v. *Railroad Company*, 1 Wall. 491, 510; *Rubber Company* v. *Goodyear*, 9 Wall. 788, 795; *McClain* v. *Ortmayer*, 141 U. S. 419, 425; Walker on Patents (5th ed.) § 185. Neither did the Court of Appeals of the Sixth Circuit, nor did the district courts of that circuit so find.

Our conclusion requires a reversal of the decree of the Circuit Court of Appeals including its ruling on the cross appeal as to claim No. 3 and a remanding of the case to the district court for further proceedings in accord with this opinion.

Reversed.

RICHMOND SCREW ANCHOR COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS

No. 99. Argued December 1, 1927.—Decided January 3, 1928.

1. Patent No. 1,228,120, issued May 29, 1917, to Lenke for a cargo beam capable of moving on a horizontal axis so as to present its full strength in the line of stress, thus permitting the use of less metal than was required for the fixed beam of the prior art, and saving expense in installation—*held* valid. P. 339.
2. Where two reasons are given in an opinion for the same decision, neither is *obiter dictum*. P. 340.
3. Rev. Stat. § 3477, forbidding assignments of claims against the United States prior to allowance, liquidation and issuance of a warrant for payment, applied to claims for infringement of a patent. P. 340.
4. The right to recover for past infringement of a patent by a private party is assignable with the patent. P. 344.
5. Under the Act of June 25, 1910, where a patented article was made for the United States by a contractor, unauthorized by the patent owner, and used by the United States, the patent owner had an assignable right of action for the infringement against the contractor; and a claim against the United States for reasonable compensation for the use, assertable in the Court of Claims, but subject to the provisions of Rev. Stats. § 3477 forbidding assignments. Pp. 341, 344, 346.
6. Under the Act of July 1, 1918, which did away with the remedy against the contractor in such cases, and confined the patent owner to a suit against the United States in the Court of Claims for "recovery of his reasonable and entire compensation for such use and manufacture," the claim of the patent owner against the

United States for manufacture and use occurring since the date of the Act, is assignable with the patent, notwithstanding the sweeping terms of Rev. Stats. § 3477. P. 345.

7. Federal statutes should be so construed as to avoid serious doubt of their constitutionality. P. 346.

8. The special intent to permit such assignments, deducible from the later statute and its history, though not expressed, must prevail over the broad general terms of the earlier one forbidding assignments. P. 346.

61 Ct. Cls. 397, reversed.

CERTIORARI, 273 U. S. 679, to a judgment of the Court of Claims, rejecting a claim for infringement of a patent.

Mr. Charles E. Hughes, with whom *Messrs. Wm. Houston Kenyon, Archibald Cox, O. Ellery Edwards, Joseph W. Cox,* and *Douglas H. Kenyon* were on the brief, for petitioner.

Use by the United States after March 7, 1921, when petitioner's ownership of the patent began, was in itself an infringement of the patent and, without more, supports the petition and entitles the petitioner to recovery under the findings of fact made by the Court of Claims. *Cramp* v. *International Co.,* 246 U. S. 28; *Marconi Wireless Co.* v. *Simon,* 246 U. S. 46; 227 Fed. 906, and 231 Fed. 1021; *Crozier* v. *Krupp,* 224 U. S. 290; Act of 1918; Act of 1910; *Sperry* v. *Arma Engineering Co.,* 271 U. S. 232.

Manufacture by the contractors for the United States on January 1, 1919, prior to petitioner's ownership, was an infringement by the contractors, the right to recover for which was assignable with the patent under Rev. Stats. § 4898, and the right to recover from the United States the reasonable and entire compensation for that infringement was given to the then owner of the patent by the Act of 1918. This was assignable with the patent under Rev. Stats. § 4898, and in spite of Rev. Stats. § 3477, and, without more, supports the petition and en-

titles petitioner to a recovery under the findings of fact made by the Court of Claims. *E. W. Bliss Co.* v. *United States,* 253 U. S. 187; *Standard Oil Co.* v. *United States,* 267 U. S. 76; *Sperry Gyroscope Co.* v. *Arma Co.,* 271 U. S. 232.

To construe the Act of 1918 as relieving the contractors from all liability to the then owner of the patent or to his assignee, and substituting therefor a liability of the United States to the then owner of the patent only and (under Rev. Stats. § 3477) not to his assignee, would appear to be taking private property for public use without due process of law or just compensation, and certainly would not give the owner of the patent an additional remedy, as the Act of 1918 purports to do, but a substantially curtailed remedy. It is certainly not clear that the Act of 1918 intended this curtailment of remedy. A construction of the Act of 1918 in this regard which preserves all the rights of the owner of the patent, rather than substantially curtails those rights and remedies, is clearly indicated and is enforced by familiar canons of construction.

While, in so far as concerns the contractors' infringing acts, the suit is, by virtue of the Act of 1918, one against the United States, the claim was not against it, but against the contractors. The Act of 1918 changed the defendant and the forum, but did not change the nature or the incidents of the claim.

The history of the Act of 1918 shows the legislative intent to relieve the contractor from all liability and from all apprehension of liability, by substituting the liability of the United States.

Why does the Act of 1918 exclude from its benefits the assignee of any patentee who at the time he makes the claim for past infringement by the United States is in the service of the Government, if all assignees are excluded by Rev. Stats. § 3477?

The Act names the defenses of which the United States is permitted to avail itself, and they do not include Rev. Stats. § 3477.

Rev. Stats. § 3477, is not applicable to any branch of the claim against the United States for infringement prior to March 7, 1921, for the assignability of that branch of the claim is determined by the patent statutes, Rev. Stats. § 4898, as an incident of the assignability of the patent itself.

The so-called decision in *Brothers* v. *United States,* 250 U. S. 88, was an *obiter dictum,* and we respectfully submit that it was error and we ask reconsideration. *United States* v. *Corbett,* 215 U. S. 233; *Grigsby* v. *Russell,* 222 U. S. 149; *Barnes* v. *Alexander,* 232 U. S. 117.

Section 3477 refers to claims in the nature of a chose in action at common law, and an assignment of Letters Patent together with all claims for past infringements, is not within its meaning. *Crown Die & Tool Co.* v. *Nye Tool Works,* 261 U. S. 24; *Gayler* v. *Wilder,* 10 How. 477; Robinson on Patents, Vol. 3, p. 122, § 937; *Gordon* v. *Arthony,* 16 Blatchf. 234.

Where a specific section of a law is in apparent conflict with a general section, the two should be considered and the context considered and the probable legislative intent, but presumably the specific should prevail over the general. *Townsend* v. *Little,* 109 U. S. 504; *Washington* v. *Miller,* 235 U. S. 422.

Under the findings of fact made by the Court of Claims, the patent is valid, and is infringed, and the petitioner is entitled to a substantial money recovery from the United States, which shall cover and include the capital saving realized by the contractors and the United States. *Mowry* v. *Whitney,* 14 Wall. 620; *Tilghman* v. *Proctor,* 125 U. S. 136; *Mevs* v. *Conover,* 125 U. S. 144; *Elizabeth* v. *Pavement Co.,* 97 U. S. 126; *Root* v. *Railway Co.,* 105 U. S. 189; *Thompson* v. *Wooster,* 114 U. S. 104; *The*

Beaconsfield, 158 U. S. 303. See also *Atlantic & Pacific Ry. Co.* v. *Laird,* 164 U. S. 393; *Clay* v. *Waters,* 161 Fed. 815; *Miller* v. *Robertson,* 266 U. S. 243.

An additional sum, equal to interest on the capital saving of $103,480 from January 1, 1919, should be included in the award to petitioner.

Mr. Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* was on the brief, for the United States.

So far as § 3477 is concerned, there is no reason to distinguish as to the assignability of unliquidated claims against the United States between those arising through infringement by the United States and those based on the assumption of liability by the United States for infringement by others. *United States* v. *Gillis,* 95 U. S. 407; *Spofford* v. *Kirk,* 97 U. S. 484; *Goodman* v. *Niblack,* 102 U. S. 556; *Seaboard Air Line* v. *United States,* 256 U. S. 655; *Price* v. *Forrest,* 173 U. S. 410; *Brothers* v. *United States,* 250 U. S. 88.

The findings show no basis for substantial recovery for infringement occurring after petitioner acquired the patent. If claims for infringement arising previously were not lawfully assigned to petitioner, its recovery is limited to infringements by the United States occurring between March 7, 1921, and the date of the commencement of this suit, May 23, 1921, a period of little over two months. The infringing manufacture of the beams for the United States and their installation took place before March 7, 1921. The value of the invention rests in the substitution of a lighter beam for a heavier one, with a resulting saving in metal. There is no finding that the completed and installed device has any advantage over the old type of rigid cargo beam.

The petitioner attempts to treat this saving in cost of installation, or in the original cost of the equipment, as a

saving in cost of handling cargoes, but the saving took place before any cargo was handled, and would have been the same if the apparatus had been destroyed the day after it was installed. It is settled, too, except where accountings for profits are involved (and the United States has made no profit in that sense, and, not being subject to injunction, is not subject to recovery of profits, which is only an incident to suit for injunction), that recovery for infringement is measured by the plaintiff's loss, not by the defendant's gain. *Coupe* v. *Royer*, 155 U. S. 565; *Brown* v. *Lanyon*, 148 Fed. 838.

There is a finding that the fair license value on a royalty basis is the sum of $20 a cargo beam, amounting in this case to $16,200, irrespective of the length of time the completed apparatus is used; but if that be the measure of recovery, the cause of action for it arose when the beams were installed, in favor of the then owner of the patent, who is now entitled (his assignment being void), unless he has lost his right for some other reason, to recover such license fees from the United States. Because of § 3477, Rev. Stats., the situation is the same as if the assignment of the patent had been made without any assignment of claims for past infringement, and as if the former and present owners of the patent were each seeking to recover damages from the United States, and the question was as to how the entire recovery from the United States should be divided between them. It seems obvious from the findings that if the use of the apparatus since its installation constitutes in any proper sense a use of the invention, it is only technically so, and the recovery for the period after March 7, 1921, and prior to May 23, 1921, could only be nominal, the substantial recovery for damages going to the one who owned the patent when the beams were manufactured and installed. Being open to such a claim in favor of the original owners of the patent should relieve the United States from

a liability for the same thing to the present owner of the patent. See *Seymour* v. *McCormick,* 16 How. 480; *Birdsall* v. *Coolidge,* 93 U. S. 64; *Stutz* v. *Armstrong,* 25 Fed. 147; *Bloomer* v. *Millinger,* 1 Wall. 340.

If the petitioner could in any event recover only nominal damages for the period from March 7, 1921, to May 23, 1921, that alone would afford no reason for reversing the judgment below. *Diamon* v. *Taylor,* 99 Minn. 527.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a suit by the Anchor Company brought under the Act of June 25, 1910, c. 423, 36 Stat. 851, as amended July 1, 1918, c. 114, 40 Stat. 704, 705, to recover for the infringement of Letters Patent No. 1,228,120 for a cargo beam, granted May 29, 1917, to Melchior Lenke, and assigned by Lenke to Thomas E. Chappell, and by Chappell to the Anchor Company.

The Court of Claims first decided that the plaintiff was entitled to recover from the United States. Thereafter the court made a second decision, on December 7, 1925, in which it found as an additional fact that through the contractors who manufactured for the United States, the United States had installed, on or before January 1, 1919, 810 cargo beams covered by the Lenke patent, and that it did not thereafter install any more; that the use of the Lenke cargo beams by the United States resulted in a saving in the expense of installation of cargo beams used by it amounting in the case of each beam to 2,000 pounds of metal, with a value of 6½ cents per pound; that the single advantage which the United States gained by the use of the beams was the saving in cost of the same and the convenience resulting from their novelty.

Upon the additional findings of fact, the Government contended that the former judgment should be set aside,

and a new one entered dismissing the plaintiff's petition, for the reason that the assignment of the claims for infringement to the plaintiff was void and of no effect under section 3477 of the Revised Statutes. The Court of Claims on the second hearing yielded to this contention and dismissed the petition.

A cargo beam is a beam employed in combination with other elements to carry the weight of cargo to be removed from the holds of vessels alongside a pier or wharf and deposited on the pier or in the warehouses fronting on the same. Such beams are old and have been used for years. The method existing prior to this invention was the use of two channel beams, spaced several inches apart, firmly riveted together at the top and bottom by means of angle irons or plates, and rigidly affixed at either end to two uprights extending upward through the roof of the warehouse in brackets designed for the purpose. The record showed that a beam adaptable for the purpose weighed 3,300 pounds and must possess the full strength of withstanding the pull of cargo weights from both a vertical and diagonal angle.

Lenke conceived the idea of substituting for the fixed beam a single I beam of about 1,300 pounds in weight. At each end of the I beam he attached laterally a strong bar by means of rivets and angle irons providing holes near its upper end, through which holes he introduced pivots, thereby enabling the cargo beam to swing into any angle from which the load was applied. Lenke fastened U bolts into the center or neutral zone of the beam to receive the hoisting tackle. The real worth of the invention lay in the lightness of the cargo beam he used because the operator could present it so as to make the strain on the beam to be vertical even when force was applied from an angle.

The patent was a combination patent, and in view of the prior art was limited to the exact terms of the

claims, which made it quite narrow, as its course through the Patent Office clearly demonstrated.

It is argued, on behalf of the United States, that Lenke's invention was unpatentable because it embodied nothing more than a natural and normal modification of existing ideas. Such modifications and their advantage were all very clear after the fact; but the old beams had been in use for a number of years and a heavy weight of metal had been used when, by Lenke's device, it was cut down two-thirds. Lenke's cargo beam almost universally superseded the old one. The United States used it and it was installed in nearly every pier in the country. No one else had foreseen its advantage. Lenke offered it as a solution of the problem at a minimum cost with a maximum efficiency. The United States conceded in the Court of Claims that Lenke's patent was novel in the sense that there was nothing in the prior art exactly like it, and that it was useful. While thus, in a way, he improved an existing idea, he developed a new idea. The question of its patentability was worked out in the Court of Claims and all the judges concurred in upholding its validity and did not change their conclusion in the second judgment. We see no reason for differing from that conclusion.

The Court of Claims based its second judgment against the plaintiff on the strength of section 3477 of the United States Revised Statutes, as construed by this Court in *Brothers* v. *United States*, 250 U. S. 88, 89. The section reads as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attest-

ing witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

In the *Brothers* case, Mr. Justice Pitney said the claim of Brothers for compensation for a patent he had secured by assignment could not apply to an "unliquidated claim against the Government arising prior to the time he became the owner of the patent. Rev. Stats., § 3477."

Counsel for the petitioner here insist that this statement was not necessary to the decision because the conclusion in that case was clearly made to depend on the non-infringement of the patent and that the reference to section 3477 could only be regarded as *obiter dictum*. It does not make a reason given for a conclusion in a case *obiter dictum* that it is only one of two reasons for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than section 3477, but we can not hold that the use of the section in the opinion is not to be regarded as authority except by directly reversing the decision in that case on that point, which we do not wish to do.

An elaborate argument has been made to show that the section should not apply to the assignment of claims for infringements of a patent, for the reason that a claim for infringements is not a common law chose in action but grows out of rights created by the statutes covering patents, the provisions for their assignment and for suits by

the assignee to be found in sections 4898, 4919, 4921 and other related sections. *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24, 42, 43. But there is no conflict between the patent sections and section 3477. The latter section was passed to protect the Government and prevent frauds upon the Treasury. *Western Pacific R. R. Co.* v. *United States*, 268 U. S. 271, 275; *Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655, 657; *Goodman* v. *Niblack*, 102 U. S. 556, 559, 560. And it would seem that the danger of exploiting and harrassing the Government with the use of assignments of claims for patent infringement was within the general purpose of that section.

We come then to the question whether section 3477 and the *Brothers* case apply to the case before us, and that requires an interpretation of the amending Act of 1918 and its operation upon the rights of the assignee and owner of the patent and its claims for infringement. Exceptions to the general language of section 3477 have been recognized by this Court because not within the evil at which the statute aimed. *Seaboard Air Line Ry.* v. *United States, supra; Western Pacific R. R. Co.* v. *United States, supra; Goodman* v. *Niblack, supra; Price* v. *Forrest*, 173 U. S. 410, 421–423; *Parrington* v. *Davis*, 285 Fed. 741, 742. We think that the situation created by the provisions of the amending Act of 1918 is such that section 3477 does not apply to all of the assigned claims of the petitioner for infringement under that Act. The Act of June 25, 1910, c. 423, 36 Stat. 851, provided that whenever an invention described in and covered by a patent of the United States should thereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner might recover reasonable compensation for such use by suit in the Court of Claims. The Act contained a number of provisos, only one of which is important here, namely, that in any such suit the

United States might avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for an infringement, as set forth in Title 60 of the Revised Statutes or otherwise.

This Court held, March 4, 1918, in *Cramp & Sons* v. *International Curtis Marine Turbine Company*, 246 U. S. 28, 42, 45, that the Act of 1910 did not effect a license to the United States or the contractor, making the patented device, to make or use the invention, and that the contractor could be sued for an injunction and for infringement in spite of the operation of that Act.

On April 20, 1918, the Acting Secretary of the Navy wrote a letter to the Chairman of the Committee on Naval Affairs of the Senate, in which he said, referring to the *Cramp* case, that the Department was "confronted with a difficult situation as the result of a recent decision by the Supreme Court affecting the government's rights as to the manufacture and use of patented inventions, and it seems necessary that amendment be made of the Act of June 25, 1910 . . . . the decision is, in effect, so far as it is of importance here, that a contractor for the manufacture of a patented article for the government is not exempt, unless he is only a contributory infringer, from injunction and other interference through litigation by the patentee.

"A prior decision of the Supreme Court, that in the case of *Crozier* v. *Krupp*, had been interpreted as having the opposite meaning, and the department was able up to the time of the later decision, on March 4th last, to proceed satisfactorily with the procuring of such patented articles as it needed, leaving the matter of compensation to patentees for adjustment by direct agreement, or, if necessary, by resort to the Court of Claims under the above mentioned act of 1910. Now, however, manufacturers are exposed to expensive litigation, involving the possibilities of prohibitive injunction, payment of royalties, rendering of accounts, and payment of punitive damages, and they

are reluctant to take contracts that may bring such severe consequences. The situation promises serious disadvantage to the public interests, and in order that vital activities of this department may not be restricted unduly at this time, and also with a view of enabling dissatisfied patentees to obtain just and adequate compensation in all cases conformably to the declared purpose of said act, I have the honor to request that the act be amended by the insertion of a proper provision therefor in the pending naval appropriation bill."

In response to this communication, the Act of July 1, 1918, amending the Act of 1910, was adopted. (See *Wood* v. *Atlantic Gulf & Pacific Co.*, 296 Fed. 718, 720, 721, and Congressional Record, 65th Congress, Second Session, Proceedings of June 18, 1918, p. 7961). The amendment (c. 114, 40 Stat. 704, 705) reads as follows:

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

This is followed by the same provisos as in the Act of 1910, which need not be repeated here.

The purpose of the amendment was to relieve the contractor entirely from liability of every kind for the infringement of patents in manufacturing anything for the Government and to limit the owner of the patent and his assigns and all claiming through or under him to suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. The word "entire" emphasizes the exclusive and comprehensive character of the remedy provided. As the Solicitor General says in his

brief with respect to the Act, it is more than a waiver of immunity and effects an assumption of liability by the Government.

Under the Act of 1910, the remedy of the owner of a patent where the United States had used the invention without his license or lawful right to use it, was to sue for reasonable compensation in the Court of Claims, and that remedy was open to Lenke for the cargo beams covered by his patent installed and used by the United States before July 1, 1918.

The evidence does not show at what time during the year 1918 the beams were installed. The first finding is that Lenke wrote to an officer in the Quartermaster's Department on duty at the Army supply base at Brooklyn, on December 31, 1918, complaining that the Lenke cargo beam was being used by the Government at that supply base without permission from the patentee, but nothing happened but a fruitless correspondence.

The findings of the Court of Claims show that, on January 1, 1919, 810 of the beams had been installed at the instance of the Government, but how many were installed after July 1, 1918, when the law in question was passed, has not been found by the Court of Claims.

On September 29, 1920, the Lenke patent was assigned by Lenke to one Thomas E. Chappell, who in turn on March 7, 1921, assigned it to the plaintiff company, in accordance with the statute, and the assignment in each case covered all rights of action for past infringements of the patent and all rights to recoveries by suit for damages, profits and royalties for infringements of every kind whatsoever.

It is settled that, but for the Act of 1918, the two assignments vesting title in the Anchor Company would enable it to recover from the contractor for all his infringements (*Crown Die & Tool Co.* v. *Nye Tool & Machine Works, supra; Gordon* v. *Anthony,* 16 Blatchf. 234, Fed.

Cas. No. 5,605; *Waterman* v. *Mackenzie,* 138 U. S. 252, 256, 261; *Galer* v. *Wilder,* 10 How. 476, 494; Robinson on Patents, vol. 3, sec. 937, p. 122). If now section 3477 applies and these assignments are rendered void, the effect of the Act of 1918 is to take away from the assignee and present owner not only the cause of action against the Government, but also to deprive it of the cause of action against the infringing contractor for injury by his infringement. The intention and purpose of Congress in the Act of 1918 was to stimulate contractors to furnish what was needed for the War, without fear of becoming liable themselves for infringements to inventors or the owners or assignees of patents. The letter of the Assistant Secretary of the Navy, upon which the Act of 1918 was passed, leaves no doubt that this was the occasion for it. To accomplish this governmental purpose, Congress exercised the power to take away the right of the owner of the patent to recover from the contractor for infringements. This is not a case of a mere declared immunity of the Government from liability for its own torts. It is an attempt to take away from a private citizen his lawful claim for damage to his property by another private person which but for this Act he would have against the private wrongdoer. This result, if 3477 Rev. Stats. applies and avoids the assignment, would seem to raise a serious question as to the constitutionality of the Act of 1918 under the Fifth Amendment to the Federal Constitution. We must presume that Congress in the passage of the Act of 1918 intended to secure to the owner of the patent the exact equivalent of what it was taking away from him. It was taking away his assignable claims against the contractor for the latter's infringement of his patent. The assignability of such claims was an important element in their value and a matter to be taken into account in providing for their just equivalent. If section 3477 applied, such equivalence was impossible.

It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality. *Phelps* v. *United States*, 274 U. S. 341. Moreover, we should seek to carry out in our dealing with the Act of 1918 and Revised Statutes 3477 the very important Congressional purpose of the former, as already explained, in the promotion of the War, as a special legislative intent. It is our duty to give effect to that special intent although it be not in harmony with a broad purpose manifested in a general statute avoiding assignment of claims against the Government, enacted some eighty years ago. *In re Rouse, Hazard & Co.*, 91 Fed. 96, 100, 101; *Townsend* v. *Little*, 109 U. S. 504, 512; *Washington* v. *Miller*, 235 U. S. 422, 428. This is in accord with general rules of interpretation, as shown in these authorities, and reconciles section 3477 Revised Statutes and the Act of 1918, if we hold, as we do, that section 3477 does not apply to the assignment of a claim against the United States which is created by the Act of 1918 in so far as the Act deprives the owner of the patent of a remedy against the infringing private contractor for infringements thereof and makes the Government indemnitor for its manufacturer or contractor in his infringements.

Such a conclusion requires us to reverse the case and remand it to the Court of Claims for additional findings to show how many of the patented beams were made by contractors and furnished to the United States after the passage of the Act of July 1, 1918, and what would have been a reasonable royalty therefor.

The question of the amount of or the rule for measuring the recovery we do not decide, but leave that for further argument and consideration by the Court of Claims, because of the novel and only partial application of § 3477 Rev. Stat.

Reversed and remanded.

UNITED STATES *v.* MURRAY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

COOK *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 394, 539. Argued November 22, 23, 1927.—Decided January 3, 1928.

When a person sentenced to imprisonment by a District Court has begun to serve his sentence, that court has no power under the Probation Act of March 4, 1925, to grant him probation even though the term at which sentence was imposed had not expired. P. 352.

19 F. (2d) 826, affirmed.

The first of these cases came here by a certificate from the Circuit Court of Appeals for the Eighth Circuit, propounding a question arising upon review of an order of the District Court placing a convict on probation after he had begun service of his sentence. The entire record was ordered up.

The second case came up by writ of certiorari (*post*, p. 516) to a judgment of the Circuit Court of Appeals for the Fifth Circuit which reversed a similar order of probation.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Louise Foster*, Attorney in the Department of Justice, were on the brief, for the United States.

The Murray case is not moot if the defendant may be recommitted to jail to serve the remainder of the sentence, because the order for probation was void.

The limitation on the power of a federal court to alter a sentence after execution has commenced, has not been

changed by the Probation Act. *Stewart* v. *United States,* 300 Fed. 769; *United States* v. *Howe,* 280 Fed. 815; *Ex parte Lange,* 18 Wall. 163; *Miller* v. *Snook,* 15 F. (2d) 68; *Archer* v. *Snook,* 10 F. (2d) 567.

Neither the language of the Act when considered as a whole, nor the declared purpose of Congress in passing it, is consistent with the granting of probation after commitment. *Mouse* v. *United States,* 14 F. (2d) 202; *Archer* v. *Snook,* 10 F. (2d) 567; House Report No. 1377, 68th Congress, 2d Sess., p. 2.

The decisions support the contention of the United States. *Nix* v. *James,* 7 F. (2d) 590; *Kriebel* v. *United States,* 10 F. (2d) 762; *Evans* v. *District Judge,* 12 F. (2d) 64; *Ackerson* v. *United States,* 15 F. (2d) 268; *United States* v. *Chafina,* 14 F. (2d) 622; *Davis* v. *United States,* 15 F. (2d) 697; *Archer* v. *Snook,* 10 F. (2d) 567; *Mouse* v. *United States,* 14 F. (2d) 202; *United States* v. *Young,* 17 F. (2d) 129; *United States* v. *Davis,* 19 F. (2d) 536; *People ex rel. Paris* v. *Hunt,* 201 App. Div. (N. Y.) 573, affirmed, 234 N. Y. 558; *State* v. *Ensign,* 38 Idaho, 539; *State ex rel. Reid* v. *District Court,* 68 Mont. 309; *State ex rel, Bottomly* v. *District Court,* 73 Mont. 541; *State ex rel. Zabel* v. *Municipal Court,* 179 Wis. 195.

The expiration of the term at which sentence was imposed or mandate of appellate court received may not deprive the district court of power to grant probation, provided the convict has not been committed. *Nix* v. *James,* 7 F. (2d) 590; *Kriebel* v. *United States,* 10 F. (2d) 762; *Evans* v. *District Judge,* 12 F. (2d) 64; *Ackerson* v. *United States,* 15 F. (2d) 268.

No appearance for Murray.

Mr. Herbert C. Wade, with whom *Mr. Sam J. Callaway* was on the brief, for petitioner Cook.

The provisions of the Probation Act are plain and unambiguous and empower the courts of original jurisdiction

to place upon probation a person convicted at a term of court which has expired and who is serving his sentence in the penitentiary, the only condition being that it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby. The statute provides that this may be done "after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment." It contains no limitation as to the time after conviction, plea of guilty, or nolo contendere, within which the power must be exercised. The statute is obviously remedial, and should, if necessary, be given a fairly liberal construction.

The expression "to suspend the execution" fits a person already serving a sentence just as well as one who has not commenced the service of a sentence pronounced.

If the statute applies after the term of court has expired, there is no logical reason why it should not apply even though the applicant is serving his sentence.

Decisions of other courts regarding probation: *Nix* v. *James,* 7 F. (2d) 590; *Lovejoy* v. *Isbell,* 70 Conn. 557; *Sommers* v. *Johnson,* 4 Vt. 278; *United States* v. *Nix,* 8 F. (2d) 759; *Kriebel* v. *United States,* 10 F. (2d) 762; *Evans* v. *District Judge,* 12 F. (2d) 64; *Ackerson* v. *United States,* 15 F. (2d) 268; *State ex rel. Zabel* v. *Municipal Court,* 179 Wis. 195; *United States* v. *Chafina,* 14 F. (2d) 622; *United States* v. *Davis,* 19 F. (2d) 536; *Miller* v. *Snook,* 15 F. (2d) 68; *United States* v. *Young,* 17 F. (2d) 129; *Archer* v. *Snook,* 10 F. (2d) 567; *Davis* v. *United States,* 15 F. (2d) 697; *Mouse* v. *United States,* 14 F. (2d) 202; *State* v. *Teal,* 108 S. C. 455; *Antonio* v. *Milliken,* 9 Ohio App. 356; *State* v. *Ensign,* 38 Idaho 539; *State ex rel. Reid* v. *District Court,* 68 Mont. 309; *State ex rel. Bottomly* v. *District Court.* 73 Mont. 541.

Where the terms of the statute are unambiguous and do not involve an absurdity, it is the duty of the Court to give effect to the language as written regardless of afterthoughts as to what should have been provided. *Caminetti* v. *United States,* 242 U. S. 470; *Hamilton* v. *Rathbone,* 175 U. S. 414.

At least two state statutes in existence when the federal Act was passed have been held to apply to persons serving their sentences. *Antonio* v. *Milliken,* 9 Ohio App. 356; *State* v. *Teal,* 108 S. C. 455. It does not appear from its proceedings or otherwise that Congress was attempting to pattern after any particular state enactment.

If Congress did not intend the Act to apply to persons already serving their sentences of imprisonment, why did it not insert a provision expressly so stating, like the one contained in the New York law?

As to the constitutionality of the Probation Act, see *Ex parte United States,* 242 U. S. 27; *Nix* v. *James,* 7 F. (2d) 590; *Anderson* v. *Carroll,* 263 U. S. 192; *O'Brien* v. *McClaughry,* 209 Fed. 819; *Thompson* v. *Duehay* (D. C.), 217 Fed. 484, affirmed, 223 Fed. 305.

Mr. Chief Justice Taft delivered the opinion of the Court.

These cases involve the construction of the Act of March 4, 1925, c. 521, 43 Stat. 1259, which provides a probation system for United States Courts.

No. 394 came here by certificate from the Circuit Court of Appeals for the Eighth Circuit and we ordered up the entire record. Section 239 of the Judicial Code, Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

On October 22, 1926, in the District Court of the United States for the District of Nebraska, the defendant, Glen Murray, pleaded guilty to certain violations of the National Prohibition Act. On October 25, 1926, he was sentenced to three months' imprisonment at the Douglas

County jail, at Omaha. On the same day he was delivered by the United States Marshal, in pursuance of the sentence, to the jail keeper, and commenced serving it. On October 26th, the next day, and during the same term of court, the district court entered an order placing him on probation, which read as follows:

"Ordered and adjudged that said defendant, Glen Murray, be placed on probation for the period of two (2) years, under the personal supervision of Robert P. Samardick, who is hereby appointed and constituted probation officer in this case."

The United States took the case to the Circuit Court of Appeals by writ of error. The question certified to this Court by that court was as follows:

"Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat., chap. 521, p. 1259, to make during the term at which sentence was imposed the order placing the defendant in error upon probation after he had commenced to serve sentence?"

On November 21, 1923, Frederick A. Cook was indicted in the District Court of the United States for the Northern District of Texas. He was convicted on twelve counts charging him with using the United States mails in executing a scheme to defraud within section 215 of the United States Criminal Code, and was sentenced by a district judge designated from another district and circuit to a total of fourteen years and nine months and to pay a total fine of $12,000. He was thereafter confined in the county jail of Tarrant County, Texas, where he remained until after his case had been appealed to the Fifth Circuit Court of Appeals, which affirmed the sentence in February, 1925. In April, 1925, he was transported to the United States penitentiary at Leavenworth, Kansas, to serve his sentence, where he has been confined ever since. In February, 1927, he applied to the regular judge of the district

where he had been sentenced to enter an order placing him on probation for a period of five years in the care of a special probation officer under the Probation Act. The application was granted on March 17, 1927. The warden of the penitentiary was directed to release Cook from custody, and one W. Erskine Williams was appointed probation officer to whom Cook should report every six months. The record contains an elaborate opinion of the district judge upholding his power to make the order.

Objecting to the order, the United States sued out a writ of error to the district court from the Circuit Court of Appeals. That court held that the Probation Act did not empower the district court to grant probation to Cook; that the power conferred in the act was not exercisable in a case which had passed beyond the court's control by the rendition of a final judgment and the expiration of the term during which such judgment was rendered. 19 Fed. (2d) 826. We brought the case here by a writ of certiorari, *post*, p. 516.

The first question which we must consider, and which if we decide in favor of the Government controls both cases and disposes of them, is whether there is any power in the federal courts of first instance to grant probation under the Probation Act, after the defendant has served any part of his sentence. The Probation Act, 43 Stat. 1259, c. 521, provides in its first and second sections as follows:

"That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon

probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

Its subsequent sections provide for the appointment of one or more suitable persons to serve as probation officers

and for their compensation and expenses, make it the duty of the probation officer to furnish to the person released a written statement of the conditions of probation, to keep informed concerning the conduct and condition of each person on probation, and report it to the court, to aid the persons on probation and to bring about improvements in their conduct and condition; to keep records of his work, accounts of the moneys collected from persons under his supervision, and give receipts therefor and make monthly returns thereof and to have the same power of arrest as is now exercised by a deputy marshal. The fifth section makes the act to take effect immediately.

The report of the Committee on the Judiciary of the House of Representatives recommending the bill which became the act, (Report No. 1377, 68th Congress, 2d Session), stated its purpose and continued:

"Prior to the so-called Killitts case, rendered in December, 1916, the district courts exercised a form of probation either by suspending sentence or by placing the defendants under State probation officers or volunteers. In this case, however (*Ex parte United States*, 242 U. S. 27), the Supreme Court denied the right of the district courts to suspend sentence. In the same opinion the court pointed out the necessity for action by Congress if the courts were to exercise probation powers in the future. The language of the court is as follows:

"'So far as the future is concerned . . . recourse must be had to Congress, whose legislative power on the subject is, in the very nature of things, adequately complete'.

"Since this decision was rendered, two attempts have been made to enact probation legislation. In 1917, a bill was favorably reported by the Judiciary Committee and passed the House. In 1920, the Judiciary Committee again favorably reported a probation bill to the House, but it was never reached for definite action.

"If this bill is enacted into law, it will bring the policy of the Federal Government with reference to its treatment of those convicted of violations of its criminal laws in harmony with that of the States of the Union. At the present time every State has a probation law, and in all but 12 states the law applies both to adult and juvenile offenders."

The report contains a memorandum in support of the bill, of which the following are passages:

"Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment. . . .

"It frequently happens that the same or a similar offense is committed by a hardened repeater who is deserving of no mercy at the hands of the court, and by a young boy, a first offender who has been led into crime by evil associates or bad environment, who after his detention and trial is thoroughly repentant and capable of becoming an upright citizen if extended a helping hand upon his release. . . .

"The parole laws and pardoning power of the President are not adequate to meet the need for a probation system. Under the parole law the defendant must be committed and serve at least one-third of the sentence in full. This usually means six months' sentence and always means the branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it. The presidential power of pardon is subject to the same criticism and can naturally only be exercised in special cases."

By the Act of June 21, 1902, c. 1140, 32 Stat., 397, sec. 1, every person convicted of an offense against the United

States and confined in the penitentiary or jail for a definite term, having faithfully observed all the rules, becomes entitled to a deduction of five days for each month of the first year of his imprisonment, and for the period between one year and three, of six days, and increasing allowances therefor until it reaches ten days for each month in a sentence of ten years or more.

The Probation Act gives power to grant probation to a convict after his conviction or after a plea of guilty, by suspending the imposition or suspending execution of the sentence. This probation is to be after conviction or plea of guilty. The question is—Before what time must it be granted? Two answers to this latter question are possible. It must either be grantable at any time during his whole sentence or be limited to a time before execution of the sentence begins. If the first answer is adopted, it would confer very comprehensive power on the district judges in the exercise of what is very like that of executive clemency in all cases of crime or misdemeanor. It would cover in most cases the period between the imposition of the sentence and the full execution of it. It would cover a period in which not only clemency by the President under the Constitution might be exercised but also the power of parole by a Board of Parole abating judicial punishment to the extent of two-thirds of it as to all crimes punishable by imprisonment for more than one year. It seems quite unlikely that Congress would have deemed it wise or necessary thus to make applicable to the same crimes at the same time three different methods of mitigation.

Nor can we suppose that Congress would wish to grant such extended power in all but life and capital cases to the district judges and thus subject each to the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for

the hard worked district judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can. Executive clemency must of course cover every form of relief from punishment. The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts during their incarceration and to shorten it not only by the regular monthly reduction of days but by a larger diminution by parole.

What was lacking in these provisions was an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict. This amelioration had been largely furnished by a power which trial courts, many of them, had exercised to suspend sentences. In some sections of the country it had been practiced for three-quarters of a century. By the decision in *Ex parte United States*, 242 U. S. 27, that remedy was denied. In that case, however, this court suggested legislation to permit probation. For eight years thereafter Congress was petitioned to enact it, and finally the Probation Act was passed.

The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus poenitentiae* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at

time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte Lange,* 18 Wall. 163. Such a limit for probation is a natural one to achieve its end.

The words of the first section important upon this issue are: " shall have power, after conviction or after a plea of guilty or nolo contendere, . . . to suspend the imposition or execution of sentence and to place the defendant upon probation." The words mean to suspend the imposition of sentence or to suspend the execution of sentence, and that the placing of defendant upon probation is to follow the suspension of the imposition or the suspension of the execution of sentence, without an interval of any part of the execution. That is a reasonable construction and serves the well understood purpose of the statute. The suspension of execution was the point in time to which the provision for probation was directed. We do not say that the language is not broad enough to permit a possibly wider construction, but we think this not in accord with the intention of Congress.

This Act has been before courts of first instance and circuit courts of appeals a number of times, but we have found only one reported case, in addition to the decisions by the district courts in the instant cases, in which it has been held that probation may be granted after the service of the sentence has begun. That case is *United States* v. *Chafina,* 14 Fed. (2d) 622, a district court case. The other cases brought to our attention are not inconsistent with our ruling. *Nix* v. *James, District Judge,* 7 Fed.

(2d) 590; *Kriebel* v. *United States,* 10 Fed. (2d) 762; *Evans* v. *District Judge for the Western District of Tennessee,* 12 Fed. (2d) 64; *Ackerson* v. *United States,* 15 Fed. (2d) 268; *Davis* v. *United States,* 15 Fed. (2d) 697; *United States* v. *Young,* 17 Fed. (2d) 129; *United States* v. *Davis,* 19 Fed. (2d) 536.

With this interpretation of the statute it must be decided that the district court neither in the *Glen Murray* case nor in the *Cook* case had power to grant probation. It is true that there was but one day of execution of the sentence in the *Murray* case, but the power passed immediately after imprisonment began and there had been one day of it served. The cause is remanded to the district court with instructions to reverse the order placing Murray upon probation and for further proceedings. In the *Cook* case the action of the Circuit Court of Appeals reversing the order of the district court of the United States for the Northern District of Texas granting to Cook probation is affirmed.

No. 394, reversed,
No. 539, affirmed.

THE EQUITABLE TRUST COMPANY OF NEW YORK, TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE, *v.* THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 130. Argued December 7, 1927.—Decided January 3, 1928.

1. A New York banking firm, in order to enable small banks in this country to draw upon foreign banks with which it had credit, offered, upon receipt of advice of such a draft accompanied by funds adequate to cover it and the firm's compensation, to forward advice of the draft to the drawee bank and to provide the drawee

with funds sufficient for its payment, by transfer of the firm's credit with the drawee, or otherwise, the drawing bank to act as principal, and draw in its own name and the firm being employed merely as agents of the drawer for the purpose of giving such advice and of providing such funds. In pursuance of this plan, a Colorado bank, claimant herein, drew and sold its draft on an Italian bank, notified the firm, requesting that it protect the draft on presentation, and sent it a check which the firm deposited to its general account in New York. The firm then sent to the Italian bank a list of drafts, including drafts issued by itself and by other banks as well as that of the claimant, with a request to the Italian bank to protect and honor them and charge them to the firm's account. The Italian bank so charged them, and credited them in an account "Drafts Payable." To compensate that bank, the firm's account ceased to draw interest on the amount so charged. International banking practice permitted the firm to cancel such advices if it saw fit, and regain its credit. It did not appear that the claimant or the holder of its draft knew of the mode of book-keeping described. Thereafter the firm became bankrupt, the draft for that reason was dishonored, the drawer took it up, and claimed special reimbursement from the trustee in bankruptcy for the amount it paid the firm. *Held:*

(1) That the sum paid by the claimant to the bankrupt was not paid upon trust to be applied to the draft. P. 366.

(2) The claimant was not an equitable assignee, *pro tanto*, of the bankrupts' deposit with the drawee. *Id.*

2. The words "Pay from balance against this check," do not import an assignment. P. 368.

13 F. (2d) 732, reversed.

CERTIORARI, 273 U. S. 684, to a judgment of the Circuit Court of Appeals which reversed an order of the District Court, in bankruptcy, confirming a special master's report disallowing the reclamation claim of respondent.

Mr. Godfrey Goldmark, with whom *Mr. Ralph F. Colin* was on the brief, for petitioner.

There can be no equitable assignment of a fund to come into existence unless (a) there was an intention to create an assignment; and (b) a *res* has been irrevocably

appropriated, the creation of which is a carrying out of the intention. Whether or not certain acts amount to the setting up of a *res* is in turn dependent upon the intention with which those acts are done. *Hamer* v. *Sidway,* 124 N. Y. 538; *In re Interboro Cons. Corp'n.,* 288 Fed. 334; *Hopkinson* v. *Forster,* L. R. 19, Eq. 74.

There can be no equitable assignment unless the assignee knows of and consents to the setting up of the fund, or unless the fund is taken in satisfaction of or as security for the obligation, or if the fund or balance set up remains at the risk of the alleged assignor, or if the alleged assignor retain control over the fund or balance, or may revoke his instructions with respect thereto. Pomeroy Eq. Juris., 4th ed. § 1281; *Barnes* v. *Alexander,* 232 U. S. 117; *Spellman* v. *Bankers' Trust Co.,* 6 F. (2d) 799; *Tiernan* v. *Jackson,* 5 Pet. 579; *Williams* v. *Everett,* 14 East 581; *In re Interboro Cons. Corp.,* 288 Fed. 334; *Christmas* v. *Russell,* 14 Wall. 69; *Cushings* v. *Chapman,* 115 Fed. 237. See also *In re Stiger,* 202 Fed. 791, affd. 209 Fed. 148; and 5 C. J. 913.

The mere advice to a bank of the drawing of a draft in accordance with international banking practice does not indicate an intention equitably to assign any of the depositor's balance with the drawee. *Eastman Kodak Co.* v. *Park Nat. Bank,* 231 Fed. 320, affd., 247 Fed. 1002.

The mere direction to pay a draft and charge it to the account of the depositor does not constitute an equitable assignment, nor is there an equitable assignment even if the funds have been placed in the hands of the depositary as a means of satisfying the depositor's absolute obligation. *National City Bank* v. *Hotchkiss,* 231 U. S. 50; *Eastman Kodak Co.* v. *Park Nat. Bank,* 231 Fed. 320, affd., 247 Fed. 1002; 3 Pomeroy Eq. Juris. § 1282; *Cheney* v. *Libbey,* 134 U. S. 68; *Aetna Nat. Bank* v. *Fourth Nat. Bank,* 46 N. Y. 82.

Even an agreement to pay a debt out of a designated fund does not give an equitable lien on the fund or operate as an equitable assignment. *Williams* v. *Ingersoll,* 89 N. Y. 508; *Christmas* v. *Russell,* 14 Wall. 69.

Mere book entries dividing a bank balance into two or three accounts, as a matter of convenience or in pursuance of a well established custom, do not evidence an intention to assign a fund, and do not constitute an equitable assignment. *In re Interboro Cons. Corp.,* 288 Fed. 334; *Noyes* v. *First Nat. Bank,* 180 App. Div. 162; affd. 224 N. Y. 542; *Taussig* v. *Carnegie Trust Co.,* 156 App. Div. 519; affd., 213 N. Y. 627; *Kuehne* v. *Union Trust Co.,* 133 Mich. 602.

The obligation to provide "sufficient funds" was the same as that discussed in *Beecher* v. *Cosmopolitan Trust* Co.; 239 Mass. 48. *Noyes* v. *First Nat. Bank,* 180 App. Div. 162, affd., 224 N. Y. 542; *Erb* v. *Banco di Napoli,* 243 N. Y. 45; *In re Interborough Cons. Corp.,* 288 Fed, 334, certiorari denied, 262 U. S. 752.

The contract of the parties and the method of its execution did not establish *ab initio* a fiduciary or agency relationship between the Trinidad Bank and K. N. & K. *Beecher* v. *Cosmopolitan Trust Co.,* 248 Mass. 48; *St. Regis Paper Co.* v. *Hubbs etc. Paper Co.* 235 N. Y. 30; *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.,* 258 U. S. 549; *Casement v. Brown,* 148 U. S. 615; *Employers' etc. Corp.* v. *Emergency Fleet Corp.,* 290 Fed. 182; *Bendix* v. *Staver Co.,* 174 Ill. App. 589; *Petition of Williams,* 297 Fed. 696; 2 C. J. 423; 21 Columbia Law Review 521; *Moore* v. *Potter,* 155 N. Y. 481; *Legniti* v. *Mechanics & Metals Nat. Bank,* 230 N. Y. 415; *Gravenhorst* v. *Zimmerman,* 236 N. Y. 22; *Strohmeyer etc. Co.* v. *Guaranty Trust Co.,* 172 App. Div. (N. Y.) 16; *Safian* v. *Irving Nat. Bank,* 202 App. Div. 459, affd., 236 N. Y. 513; *Sam-*

uels v. *E. F. Drew & Co.*, 296 Fed. 882; *Taussig* v. *Carnegie Trust Co.*, 156 App. Div. 519, affd., 213 N. Y. 627.

If A purchases from an American banker his draft in foreign currency upon a foreign bank and procures such draft from the American banker, he has procured what he desired in the negotiable obligation of the banker. The transaction is executed and A has become merely the owner of the banker's general obligation on the draft. *In re Bolognesi*, 254 Fed. 770; *Legniti* v. *Mechanics Bank*, 230 N. Y. 415.

If A goes to the American banker and pays him American dollars and the banker contracts to establish a credit for a definite amount of foreign currency in a foreign bank in the name either of A or A's nominee, then the contract is not that a specific sum is to be sent abroad, but rather that a specific credit is purchased, and what A gets is the banker's contract to establish that credit for that definite amount. This contract is executory but results only in A obtaining the general obligation of the banker. *Legniti* v. *Mechanics etc. Bank*, 230 N. Y. 415; *Gravenhorst* v. *Zimmerman*, 236 N. Y. 22; *Beecher* v. *Cosmopolitan Trust Co.*, 239 Mass. 48; *American Express Co.* v. *Cosmopolitan Trust Co.*, 239 Mass. 249; *Foreign Trade Banking Corporation* v. *Cosmopolitan Trust Co.*, 240 Mass. 413.

If A goes to a New York banker and directs the banker to transmit a certain specific sum of money to a person abroad, the banker is the agent of the person paying the money, and until the money is sent, will hold it as agent or trustee for the owner. Here the intention of the payer is that the money he gives to his agent shall be sent abroad. It is the amount which he gives which is to be transmitted. *Legniti* v. *Mechanics etc. Bank*, 230 N. Y. 415; *Musco* v. *United Surety Co.*, 132 App. Div. (N. Y.)

300; *People ex rel Zotti* v. *Flynn,* 135 App. Div. (N. Y.) 276.

Mr. George Trosk, with whom *Messrs. William De-Forest Manice* and *Allen R. Memhard* were on the brief, for respondent.

An equitable assignment of the moneys was effected. *Coates* v. *First Nat. Bank,* 91 N. Y. 20; *Risley* v. *Phoenix Bank,* 83 N. Y. 318; *Throop Grain Co.* v. *Smith,* 110 N. Y. 83; *Rivers* v. *Wright Co.,* 43 S. E. 499; *Muller* v. *Kling,* 209 N. Y. 239; *Fourth St. Nat. Bank* v. *Yardley,* 165 U. S. 634; *Fortier* v. *Delgado & Co.,* 122 Fed. 604; *Burns* v. *Carvalho,* 4 M. & C., 690; *Ketchum* v. *St. Louis,* 101 U. S. 306; *Hinkle Iron Co.* v. *Korn,* 229 N. Y. 179; *Jackson* v. *Tallmadge,* 216 App. Div. (N. Y.) 100.

The moneys remitted by claimant to the bankrupts were received by them in trust, as agents of the claimant, for a particular purpose. *Legniti* case, 230 N. Y. 415, 420–421; *Matter of Pacat Finance Corp.,* 295 Fed. 394.

The bankrupts received the claimant's money in trust for a particular purpose. *Giles* v. *Perkins,* 9 East 12; *Burdett* v. *Willett,* 2 Vernon 638; *In re Jarmulowsky,* 258 Fed. 231; *In re A. Bolognesi & Co.,* 254 Fed. 770; *St. Louis* v. *Johnson,* 5 Dillon, 241; *Massey* v. *Fisher,* 62 Fed. 958; *Mooreland* v. *Brown,* 86 Fed. 257; *People* v. *City Bank of Rochester,* 96 N. Y. 32; *Cutler* v. *American Exchange Nat. Bank,* 113 N. Y. 593; *People ex rel. Zotti* v. *Flynn,* 135 App. Div. (N. Y.) 276; *Peak* v. *Ellicott,* 30 Kans. 156; *Ryan* v. *Phillips,* 3 Kans. App. 704; *Star Cutter Co.* v. *Smith,* 37 Ill. App. 212; *Roca* v. *Byrne,* 145 N. Y. 182; 21 Col. Law Rev. 510; Vol. 16, No. 2, Journal, American Bankers Asso.

Mr. Harold Nathan filed a brief as *amicus curiae* by special leave of Court on behalf of Fidelity Trust Company of New York.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Knauth, Nachod and Kuhne being in bankruptcy, the respondent, The First National Bank of Trinidad, Colorado, claimed priority in respect of certain funds collected by the trustee in bankruptcy, the petitioner, from the Banca Commerciale Italiana; the ground of the claim being that these funds were charged with a trust in the hands of the Italian bank. The respondent prevailed in the Circuit Court of Appeals. 13 F. (2d) 732. A writ of certiorari was granted by this Court. 273 U. S. 684.

The facts are as follows. The bankrupts had credit with many foreign banks and to enable small banks in this country to issue drafts upon such banks in their own name offered these terms: "Upon receipt of advice of draft, accompanied by adequate funds payable at par in New York, we shall promptly forward our advice of the same and provide the drawee with funds sufficient for the payment of the draft abroad, by a transfer of credit from our balance, or otherwise, provided the draft is drawn on a bank named in our latest list of correspondents." It was added that the drawing banks act as principals and draw in their own name, the bankrupts being employed merely "as agents of the drawers for the purpose of advising the issue of their drafts and providing the drawee banks with sufficient funds to cover their payment." The bankrupts sent out lists of their foreign correspondents and also daily rate cards fixing the rate for the various foreign currencies, including their own compensation, good only for the day of the date. In accordance with this plan the Trinidad bank drew a draft on a branch of the Banca Commerciale Italiana for 24360 lire, sent notice to the bankrupts that they had sold it "and shall thank you to protect same upon presentation," and remitted therewith a check for $1,191.20, which the bankrupts received on May 22, 1923,

and deposited to their general account. On the same day the bankrupts sent to the Italian bank and to its branch a list and description of the drafts issued by inland banks and by the bankrupts and requested it to "honor the above listed drafts charging same to our account." The list was received on or before June 4, 1923; the account of the bankrupts was debited with the total amount and to that extent ceased to draw interest, the bank getting its compensation in this way. At the same time an account termed "Drafts Payable" was credited with the same amount, this account being credited in the same way with drafts from other dealers with the bank and the bankrupts themselves. In accordance with the practice in international banking, the bankrupts when they saw fit to do so cancelled their advices and were recredited in their general account; and although in fact they did not cancel the advice of inland drafts except when requested by the inland banks, the Italian bank did not know or inquire into reasons and so far as appears the Trinidad bank, or at all events the holder of the draft, knew nothing of the mode of bookkeeping described.

The draft was presented after the petition in bankruptcy had been filed and was dishonored; the petitioner as drawer had to take it up and now claims on the two grounds that the sum paid by it was paid upon trust to be applied to the draft, and that as holder of the draft it is, by subrogation, an equitable assignee of the bankrupts' deposit with the drawee. The first of these need not detain us. *Beecher* v. *Cosmopolitan Trust Co.*, 239 Mass. 48. *Legniti* v. *The Mechanics & Metals National Bank*, 230 N. Y. 415. The identity of the fund was not maintained and no one expected it to be. See *National City Bank* v. *Hotchkiss*, 231 U. S. 50, 56, 57. The bankrupts undertook to 'forward' advice but only to 'provide' the drawee with funds. The second contention was that which prevailed below. Of course there is room for difference if

the parties did not express very clearly what they wanted or meant, but we are led to a different conclusion whether the reliance be upon the rights of the holder or upon the original contract between the respondent and the bankrupts. In the first place the ignorance of the whole affair on the part of the holder and the general understanding that the party dealing immediately with the bank having the 'Bills Payable' account is master of it, as between himself and the bank, are quite inconsistent with the notion that an entry on that account is the appropriation of a fund to the holder's use. The respondent tries to give a different turn to the evidence but the master's finding and our own conclusion from the testimony leave no doubt in our minds. It is true that after such an entry the interest allowed to the depositor stops but that is only a convenient way of giving compensation to the bank. It is not uncommon in commercial transactions to see some of the elements of an earlier or a half imitated transaction appear, although the essentials of the transaction are not there. Whether a fund was appropriated or not depended wholly on the dealings between the bankrupts and the Italian bank; and both of them dealt with the account as subject to the bankrupt's control. The cessation of interest was for the benefit of the bank because the account was only with its general funds, and did not have any assets especially set aside and appropriated to it—in short was a bookkeeping device for the convenience of the bank.

Again, the terms offered by the bankrupts to their correspondents seem to us to promise the appropriation of a specified fund to the draft as little as they promise to apply the money received by them to that end. They are to provide the drawee banks with sufficient funds for the payment of the drafts by transfer of credit 'from our balance or otherwise'. They are to provide, that is, as convenient to themselves, for payment by the drawee banks, not to give them an earmark corpus to be

handed over. They are requested by their correspondents to protect the drafts, which again means merely to see that they are paid. *Wabash, St. Louis & Pacific Ry. Co.* v. *Ham,* 114 U. S. 587, 596. People dealing with large banks do not ordinarily seek the ambiguous security of an identified fund, they are satisfied if the bank gives them credit. We see no indications that the Trinidad bank was not perfectly content to know that it would have credit with the Banca Commerciale, and that in the usual course of things its drafts would be paid. Evidently with this conception of their duties the bankrupts asked the Italian bank "to protect to the debit of our account the drafts" in question and others, and the branch bank to "honor the above listed drafts." That such a letter of advice is not an assignment is clearly explained in *Eastman Kodak Co.* v. *National Park Bank,* 231 Fed. Rep. 320, 323; (affirmed, 247 Fed. Rep. 1002.)

We have called the instrument under which the respondent claims as assignee, a draft. But on its face it is called 'check'. The form was a general form furnished by the bankrupts and the purpose is said to have been that in continental Europe or some parts of it checks are not subject to the same stamp tax as drafts. It is said in a reputable work that the fact that the instrument purports to be drawn upon a deposit is what constitutes it a check. Daniels, Negotiable Instruments, 6th ed., §1569. The existence of this opinion sufficiently explains the words of the document before us 'Pay from balance against this check'. They no more purport to assign a fraction of a fund than does an ordinary check. They would not naturally take that shape as the respondent, the drawer of the check, had no fund in the hands of the drawee.

The decision of this case depends more upon the general import of the transaction and upon what the parties were

likely to want than upon the phrases that can be picked out from the several steps. We repeat that in our opinion what the parties meant to establish and what the respondent got was the assurance of a credit abroad to the extent of its check as in the case of a letter of credit, not an attenuated property right in an account to which no special funds were attached and the particulars of which neither the respondent nor the purchaser of the check could know.

Order reversed.

MR. JUSTICE STONE, dissenting.

The agreement of the bankrupts, on the faith of which petitioner sold its draft, did more than stipulate that the draft should be paid on presentation. It provided specifically the method of payment; that the bankrupts should "promptly," on notice of the draft, "provide the drawee with funds sufficient for the payment of the draft abroad, by a transfer of credit or otherwise." It plainly contemplated the course of business, actually followed, in which a credit, to be established with the drawee, was to be set apart and specifically appropriated to the payment of the draft. The draft was by its terms made payable from "balance against this Check."

We need not discuss what the petitioner's rights would have been if no such credit had been established, for here the bankrupts had performed their contract fully and to the letter. They set apart the stipulated credit. Withdrawal of it by them would have been a violation of their contract with petitioner, for the contract contained no intimation of a right to revoke it, and if the receiver had not done what they had no right to do the draft would have been paid. Nor does it appear to me that the real question is whether the Italian bank was charged with a trust with respect to funds lodged with it by the bankrupts. It may be assumed that it was not a trustee, but

only a debtor to the bankrupts for the funds thus received, with power to discharge the debt *pro tanto* by payment of the draft when presented.

Stated with precision the question seems rather to be whether, since the bankrupts had performed their agreement by specifically designating and setting apart enough of their credit with the Italian bank to meet the draft, the credit thus set apart is to be treated in equity as security for the payment of the draft. If subject to that equitable obligation, neither the bankrupts nor the receiver could convert the credit, so set apart, into cash and turn the proceeds over to general creditors freed of that obligation.

Since *Holroyd* v. *Marshall,* 10 H. L. Cas. 191, it has been generally accepted doctrine, the recording acts permitting, that an agreement to hold property which the promisor may afterward acquire as security for the payment of a debt, operates in equity once the property is acquired, to give the stipulated security to the promisee in preference to general creditors. Such is the rule in this Court. *Sexton* v. *Kessler,* 225 U. S. 90. I had supposed it to be equally well settled that the agreement need not mention the word "security" to accomplish that result, if its plain purpose is to provide for the satisfaction of a debt or obligation out of identifiable property. Compare *Walker* v. *Brown,* 165 U. S. 654; *Ingersoll* v. *Coram,* 211 U. S. 335; *Hurley* v. *Atchison, Topeka & Santa Fe Ry.,* 213 U. S. 126; *Ketchum* v. *St. Louis,* 101 U. S. 306; *Parlin & Orendorff Implement Co.* v. *Moulden,* 228 Fed. 111; *Curtis* v. *Walpole Tire & Rubber Co.,* 218 Fed. 145. There has been no dissent from the view that an agreement to apply a designated credit or account to the payment of a check or draft drawn upon it creates security in the credit enforcible in equity as against general creditors. *Fourth Street Bank* v. *Yardley,* 165 U. S. 634; *Farley* v. *Turner,* 35 L. J. Ch. 710; *Coates* v. *First National Bank,* 91 N. Y.

20; *Muller* v. *Kling*, 209 N. Y. 239; *In re Hollins*, 215 Fed. 41. Equity, in making such agreements effective, does no more than it habitually does in compelling the performance of an agreement to give a mortgage to secure advances made on the faith of the agreement.

Both parties to this transaction knew that American drafts drawn on European banks would be worthless unless definite arrangement for their payment by the drawee was made in advance of their presentation, and that where, as here, a particular credit was set apart for that purpose the utility of such drafts would be seriously impaired if the credit, once established, could be cancelled at will. No intelligent banker would sell such drafts if the establishment of such a credit were not contemplated. A bank here, drawing and selling such drafts against a credit to be established abroad by others, pledges its own credit to the payee and is secured against loss and the dishonor of its drafts only in so far as it may insure the creation of the appropriate credit and retain the benefit of it once it is created. The stipulation that the bankrupts should promptly set apart a credit for that purpose upon receipt of advice of the draft and advise the drawee of it was a material inducement to petitioner to pledge its own credit by the sale of its draft. Once performed it is valuable security to both payee and drawer, if it is permitted to have the legal sanctions which ordinarily attach to agreements of this character.

The evidence in this case appears to me, as it did to the court below, to fall far short of establishing a practice or custom, or any rule of Italian law, permitting the depositor, while the drafts are outstanding, to cancel or control for his own purposes the credit set apart for their payment. Our own rule is that a bank of deposit may not, with impunity, ignore the known equitable rights of others to the credit established by its depositor, *National Bank* v. *Insurance Co.*, 104 U. S. 54, and it would seem

that that rule should be applied here in determining the rights of the parties in the absence of proof of any other. But in any case, such control, if retained by the bankrupts as between themselves and the Italian bank, could not be rightfully exercised in violation of their contract with petitioner.

The case would therefore seem to be a proper one for the application of the rule announced by this Court in *Fourth Street Bank* v. *Yardley, supra,* that a court of equity will lend its aid to carry into effect an agreement that an obligation shall be satisfied out of a specified credit. Applied here that rule would make effective the intention of the parties and give stability to a large and important class of banking transactions. The judgment should be affirmed.

MR. JUSTICE MCREYNOLDS joins in this dissent.

BARBER ASPHALT PAVING COMPANY *v.* STANDARD ASPHALT & RUBBER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 194. Argued October 4, 5, 1927.—Decided January 3, 1928.

1. Equity Rule 75b, which prescribes the form and manner in which the evidence in a suit in equity in the District Court may be made a part of the record therein for the purposes of an appeal, is authorized by Rev. Stats. §§ 913, 917. P. 381.
2. Equity Rule 75b applies to cases to be appealed to the Circuit Court of Appeals. The Act of February 13, 1911, which relates to the manner of making up and printing the transcript of record in every kind of action or suit, where review is sought in that court, and which provides that the transcript shall contain, *inter alia,* "such part or abstract of the proofs as the rules of such Circuit Court of Appeals may require, and in such form as the Supreme Court of the United States may by rule prescribe," did not withdraw from this Court the power of regulation on which Equity Rule 75b depends. P. 381.

3. The excepting clause of the Rule, providing that "if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness," applies only to such parts as need to be examined in that form to be rightly understood; as to other parts of the evidence, it neither qualifies nor relaxes the direction for condensation and narration. P. 383.

4. A total failure to comply with Rule 75b is not condoned by the Act of Feb. 26, 1919, directing that technical errors and defects not affecting the substantial rights of the parties shall be disregarded. P. 384.

5. The District Court has jurisdiction to conform a transcript to Equity Rule 75b, when remitted to it for that purpose by the Circuit Court of Appeals after an appeal of the case. P. 385.

6. Expiration of the term of the District Court at which the decree was entered without reservation of further time for settling a statement of the evidence, does not affect the power of the District Court to act under Rule 75b. P. 385.

7. When evidence taken in a court cannot be identified by the judge, because of his death, and evidence taken by a master bears neither his certificate nor the file mark of the clerk, resort may be had to other means of identification. P. 385.

8. Affirmance of the decree *held* too severe a penalty to be inflicted by the Circuit Court of Appeals for failure to obey the requirements of Equity Rule 75b concerning condensation and narration, in view of previous indulgence of such violations by that court and the district courts of the circuit. P. 386.

9. In such a case, *held*, that the transcript should be remitted to the District Court for compliance with the rule, upon condition that the appellant pay a sum specified into the Circuit Court of Appeals to reimburse the appellee for counsel fees and expenses incurred in securing elimination of the objectionable statement of evidence, besides the costs here and in the Circuit Court of Appeals. P. 387.

16 F. (2d) 751, reversed.

CERTIORARI, 274 U. S. 728, to a decree of the Circuit Court of Appeals, affirming a decree of the District Court in a patent infringement suit, upon the ground that the evidence had not been brought into the record in accordance with Equity Rule 75b.

Mr. John W. Davis, with whom *Messrs. Charles Neave, Samuel E. Hibben, Henry N. Paul,* and *Edward L. Patterson* were on the brief, for petitioner.

Mr. Charles Evans Hughes, with whom *Messrs. Alexander F. Reichmann, Thomas G. Haight, Frank L. Belknap,* and *William F. Hall* were on the brief, for respondent.

Mr. Justice Van Devanter delivered the opinion of the Court.

The principal questions to be considered relate to the steps whereby evidence in a suit in equity in a district court may be made a part of the record for the purpose of an appeal, and to the action which the appellate court appropriately may take where the requirements in that regard are not followed. To show how the questions arise and the circumstances bearing on their solution the case will be stated with some detail.

The suit was brought January 30, 1915, to obtain an injunction against the infringement of letters patent and to recover profits made out of the infringement. The answer put in issue the plaintiff's title, the validity of the letters patent and the infringement. A hearing, at which evidence both oral and documentary was received, resulted, February 20, 1917, in an interlocutory decree whereby the issues were resolved in the plaintiff's favor and the cause was referred to a master with directions to ascertain the profits, to take evidence to that end and to report his findings "together with all evidence" taken before him. See 240 Fed. 749. The decree recited that the evidence underlying it was "filed" in the cause.

The defendant neither did nor could appeal from the interlocutory decree; for it did not grant an injunction, the letters patent having expired shortly before it was entered. To have it reviewed the defendant must await the

final decree and appeal from that, which would bring under review the entire proceedings, if challenged in the assignments of error.

Up to and including the entry of the interlocutory decree the proceedings were had while Judge Humphrey was holding the district court. He died June 14, 1918, while the master was proceeding with the accounting; and the subsequent proceedings in that court were had before Judge FitzHenry.

January 6, 1921, the master filed his report finding that the defendant's profits from the infringement were $650,044.83 and recommending that the plaintiff recover that sum. When filing the report the master also turned in the evidence taken before him, but omitted to say so in the report. He should have attached to the evidence a certificate stating that it was the evidence and all the evidence taken before him, but he failed to attach any certificate. The clerk, although receiving the evidence as turned in by the master, omitted to put a filing endorsement thereon.

Both parties filed exceptions to the report, the exceptions purporting to be based on the evidence and treating it as duly reported. A hearing on the exceptions resulted, April 30, 1924, in a final decree overruling the exceptions, confirming the report and awarding the plaintiff the sum reported by the master with interest and costs. In a memorandum opinion explaining the rulings the court indicated that the evidence taken by the master was before it and was extensively examined.

July 1, 1924, the defendant sought and the district judge allowed an appeal from the final decree to the Circuit Court of Appeals. Both that decree and the interlocutory decree were challenged in the assignments of error—each as being without support in and contrary to the evidence underlying it.

At the appellant's instance the time for filing a transcript of the record in the Court of Appeals was enlarged a year by successive orders of the district judge. During that period the appellant, on its own responsibility, prepared, printed and lodged with the clerk for certification a proposed transcript. This transcript was in nine volumes, about 5,000 pages, and consisted mostly of evidence set forth without any approval or authentication by the court or judge and without appreciable attempt at condensation or narration, save as some exhibits may have been omitted.

April 24, 1925, after lodging the proposed transcript with the clerk and delivering a printed copy thereof to the appellee, the appellant filed with the clerk and served on the appellee a praecipe designating what should be included in the certified transcript—the designation conforming to what the appellant had embodied in the transcript proposed. The praecipe described the evidence to be included as "printed pages 24 to 1215 inclusive," which were the pages of the proposed transcript purporting to set forth the evidence underlying the interlocutory decree, and certain other "printed pages," which were the pages of that transcript purporting to contain the evidence taken before the master and accompanying his report. The appellee made no objection to the praecipe, to the designation of the evidence or to the form in which the same was set forth at the pages indicated; nor did it file a praecipe for anything more. Accordingly, the clerk, on June 24, 1925, attached to the proposed transcript his certificate stating that it was true, complete and prepared in accordance with the praecipe.

July 3, 1925, the appellant filed the certified transcript in the Court of Appeals, but omitted to file therewith the requisite copies. These were supplied four months later.

November 3, 1925, the appellant requested the Court of Appeals to divide the argument on the appeal by first hearing and deciding the questions arising on the interlocutory decree and, if it was sustained, then hearing and deciding the questions arising on the final decree. The appellee objected to this, and in that connection suggested (a) that all evidence appearing in the transcript be stricken therefrom because not stated in simple and condensed form and, where consisting of the testimony of witnesses, not stated in narrative form, but set forth in full in the original form contrary to rule 75b of the Equity Rules, and (b) that the evidence received at the hearing which resulted in the interlocutory decree be stricken from the transcript for the further reason that it was not approved or authenticated by the court or judge as required by that rule. November 9, 1925, the request to divide the argument was denied and consideration of the suggestions that the evidence be stricken from the transcript was postponed until the hearing on the merits.

January 29, 1926, at the appellant's instance, the Court of Appeals remitted the transcript to the district court to enable it to "amend its certificate of evidence" and to make "such further amendment, correction or amplification as the district judge may, upon his attention being brought to the matter, see fit to make respecting the certification of the record." In this order the Court of Appeals expressly retained jurisdiction of the appeal, directed that the transcript when corrected be returned to that court and reserved all questions respecting the validity and effect of the correction until the hearing on the merits.

March 29, 1926, the appellant presented to the district court a motion asking it to "append its certificate of evidence" to the remitted transcript and further to amend, correct or amplify the certification of the record

as it might deem proper. The appellee had due notice of this motion, appeared specially for the sole purpose of challenging the court's power to grant the motion, and declined to take any further part in that proceeding. The court called and examined some of its officers respecting the identity of the evidence received and filed at the time of the hearing before Judge Humphrey which resulted in the interlocutory decree, and found from such examination that that evidence was truly and completely set forth in the transcript. The court further found that specified exhibits were put in evidence before the master and reported by him; and, supposing that they were not included in the original transcript, it ordered that they be embodied in a supplemental transcript. Neither party made any effort at that time to have the evidence condensed or the testimony put in narrative form. On the contrary, it appears from the court's order that the appellant requested and the court directed that "all the testimony in this cause be reproduced in the exact words of the witnesses, and not in narrative form." The order further said: "And pages 24 to 4872, inclusive, of the transcript of record heretofore certified by the Clerk of this Court on June 29, 1925, amended and supplemented as herein directed, are hereby approved as a true, complete and properly prepared statement of the evidence." There was no other approval or authentication by the court or judge.

April 13, 1926, the original transcript was returned to the Court of Appeals accompanied by a supplemental transcript, designated volume 10, setting forth the later proceedings in the district court and the exhibits which it directed to be included as part of the evidence taken and reported by the master.

October 6, 1926, the cause was heard on the merits in the Court of Appeals. At this hearing the appellee renewed its prior suggestions that the evidence be stricken

from the transcript because not brought into the record conformably to rule 75b of the Equity Rules, and also insisted that the situation had not been changed by the later proceeding in the district court because (a) that court was at the time without any power to act in the matter and (b), if having power, had not conformed its action to the requirements of that rule.

December 13, 1926, the Court of Appeals held that the evidence had not been brought into the record in accordance with rule 75b, and for that reason declined to examine the evidence and affirmed the decree of the district court. 16 Fed. (2d) 751. The appellant promptly sought a rehearing on the ground, among others, that, if rule 75b applied and had not been followed, the circumstances were such that the court, in the exercise of a sound discretion, should not have affirmed the decree but should have remitted the transcript to the district court so that compliance with the rule might be had. A rehearing was denied, and on the appellant's petition a writ of certiorari was granted by this Court to the end that it might consider and determine the procedural questions involved.

To avoid possible confusion in the further reference to the parties they will be designated as they were in the Court of Appeals—the petitioner as appellant and the respondent as appellee.

In the federal courts evidence received in a suit in equity usually has been regarded as becoming a part of the record only where made so by some act of the court or judge. In the beginning either of two acts sufficed for the purpose. One was to make an appropriate recital in the decree. The other was to state the evidence or its substance in a separate writing which was to be filed and deemed a part of the record. Both courses were sanctioned by a provision in the first practice statute.[1] That

[1] Act September 24, 1789, c. 20, sec. 19, 1 Stat. 83.

provision remained in force only a short period, but the practice continued to be recognized.[2]

In 1912 the matter was dealt with in the Equity Rules, which rest largely on statutes[3] investing this Court with power "generally to regulate the whole practice to be used in suits in equity" in the district courts. Rule 75b (226 U. S. Appendix 23) provides:

"(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *praecipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made

[2] *Conn* v. *Penn*, 5 Wheat. 424; *Blease* v. *Garlington*, 92 U. S. 1; *Watt* v. *Starke*, 101 U. S. 247, 250; *Southern Building & Loan Assn.* v. *Carey*, 117 Fed. 325, 333–334; 2 Street Fed. Eq. Pr. secs. 1629, 1630; *Railway Co.* v. *Stewart*, 95 U. S. 279, 284.

[3] Rev. Stat. secs. 913, 917; U. S. Code, Title 28, secs. 723, 730.

so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

The appellant contends that this rule can have no application where the appeal is to a circuit court of appeals, first, because the Equity Rules rest on statutes which provide for regulating the practice in the district courts, not that in the circuit courts of appeals, and, secondly, because another statute has special and exclusive application where the appeal is to a circuit court of appeals. We think the contention must fail for reasons which will be stated.

It is true that the Equity Rules are based largely on statutes which authorize this Court to regulate the practice in suits in equity in "the district courts." But plainly rule 75b is within that authorization. It prescribes the form and manner in which the evidence in suits in equity in those courts may be made a part of the record therein. The prior practice had varied and experience had shown there was need for uniformity and simplicity. The rule was adopted to meet that need. That it is intended, like the prior practice, to pave the way for an appellate review extending to the evidence does not make it any the less a regulation of proceedings which are had in the district courts. Its status, therefore, is not different from that of rule 71, which requires that decrees be put in direct and simple form and be free from any recital of the pleadings, evidence, etc.

The statute which is cited as having special and exclusive application was enacted February 13, 1911, c. 47, 36 Stat. 901, and is now sections 865 and 866, Title 28, U. S. Code. It relates to the manner of making up and printing the transcript of the record, in every kind of action or suit, where review is sought in a circuit court of appeals. The provision particularly cited speaks first of the printing and then says that the transcript shall include, among

other things, "such part or abstract of the proofs as the rules of such Circuit Court of Appeals may require, and in such form as the Supreme Court of the United States may by rule prescribe." The provision is loosely phrased, but its meaning is fairly plain. What it says about including proofs doubtless refers to evidence which has become a part of the record in the district court through a settled bill of exceptions where the case is at law,[4] or through an approved statement where the case is in equity. Nothing in the provision evinces a purpose to dispense with either mode of authenticating and preserving the evidence as a part of the record. The concluding clause, "in such form as the Supreme Court of the United States may by rule prescribe," obviously reserves to this Court some power of regulation and is not lightly to be put aside. The appellant treats it as relating merely to the form in which the printing is to be done. But the context makes for a broader application. The direction for the printing and that for making up the transcript are both in a single sentence which ends with that clause. Taken in its natural sense the clause qualifies both directions. We think that is the sense intended and that the clause makes it rather plain that there was no purpose to withdraw from this Court the power of regulation on which rule 75b depends. The appellant cites our decision in *Rainey* v. *Grace & Co.*, 231 U. S. 703, as if it were to the contrary. But this is a mistaken view. The question presented there related to the printing of the transcript and to the fees to be charged in that connection. Nothing was decided or said respecting the question presented here.

The appellant next, assuming the rule applies, contends that it was complied with. We perceive no tenable basis for this contention.

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[4] See sec. 776, title 28, U. S. Code; Rule 7, 266 U. S. 657; *Mussina* v. *Cavazos*, 6 Wall. 355, 363.

Up to the certification of the original transcript nothing required by the rule had been done. In that situation the evidence should not have been included.

After the transcript was remitted to the district court with a view to action under the rule, that court entered an order (a) directing, at the appellant's request, that "all the testimony" be stated "in the exact words of the witnesses," and (b) approving the particular pages of the transcript where the evidence, oral and documentary, was set forth—4849 pages in all—"as a true, complete and properly prepared statement of the evidence." This order is the asserted basis of the contention that the rule was complied with. But it does not support the contention. It proceeds on the erroneous assumption that, where either party so requests, the court may dispense entirely with the condensation and narration of the testimony of witnesses and direct that it be stated in full in their words. The rule says that the evidence "shall not be set forth in full" but shall be stated "in simple and condensed form," that all that is not essential shall be omitted, and that the testimony of witnesses shall be stated "only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness." Manifestly the excepting clause is intended to have only a limited operation and to be applied in the course of the required condensation and narration, as special occasion therefor arises. Its purpose is to provide for the exact reproduction of such parts of the testimony as need to be examined in that form to be rightly appreciated. As to other parts of the evidence it neither qualifies nor relaxes the direction for condensation and narration. *Buckeye Cotton Oil Co.* v. *Ragland,* 11 Fed. (2d) 231, 232.

The transcript shows that in fact no part of the evidence was condensed or put in narrative form, and also that as to nearly all of the testimony there was no occasion for

reproducing it in the words of the witnesses. Had the rule been complied with the evidence would have been reduced in volume two-thirds or more; and had this work been done at the outset the charge for printing would have been proportionally less—probably more than enough to offset the cost of compliance. One object of the rule is to eliminate immaterial and redundant matter and to effect such a condensation and statement of what remains as will simplify and facilitate the task of counsel in presenting, and of the court in determining, questions turning on the evidence. Here the requirement looking to the attainment of that object was wholly neglected.

The appellant invokes the statute which directs that technical errors and defects not affecting the substantial rights of the parties be disregarded.[5] But the error here is not merely abstract or formal. It consists of a total failure to observe an important regulation in a matter of substance. Nor is it harmless. It makes the case difficult of presentation by counsel and materially augments the task of examination and decision by the court. Repetition of it in other cases would soon congest the dockets of the appellate courts. To condone such an error is not, we think, within the purpose of the statute.

The next question is whether there were circumstances which should have impelled the Court of Appeals in the exercise of a sound discretion to remit the transcript to the district court again so that full compliance might be had with the rule. The pertinent circumstances are not in controversy, save as the parties interpret them differently.

As a remission which necessarily must be futile would not be proper, we shall notice at the outset three matters

[5] Act February 26, 1919, c. 48, 40 Stat. 1181; U. S. Code, Title 28, § 391.

which the appellee insists would prevent a remission from being effective. The first is that jurisdiction of the cause passed from the district court to the Court of Appeals when the appeal was perfected. From this it is argued that the district court would be without power to take any action in the cause during the pendency of the appeal. We recognize the principle intended to be invoked but think it does not go so far. The Court of Appeals by remitting the transcript for compliance with the equity rule would be in effect directing action in aid of its appellate jurisdiction; and the district court in conforming to the direction would be recognizing rather than encroaching on that jurisdiction. The second matter is that the term of the district court at which the decree was entered expired shortly thereafter without any reservation of further time for settling a statement of the evidence. This, it is said, put an end to the district court's power to act under the equity rule. We think otherwise. Power to act under that rule is not confined to the term at which the decree is rendered, nor to a period allowed during that term. Such a restriction was not recognized in the early practice and is not expressed in the rule. Other rules, such as 69 and 72, show that where a restriction of that nature is intended it is expressed. This interpretation of the rule has been adopted by the Circuit Courts of Appeals so far as they have spoken on the subject.[6] The third matter is that by reason of the death of Judge Humphrey, who presided at the interlocutory hearing, the master's failure to attach a certificate to the evidence taken before him and the clerk's failure to place a filing endorsement thereon, the usual and favored means of identifying the evidence are not avail-

[6] *In re General Equity Rule 75*, 222 Fed., 884; *Struett* v. *Hill*, 269 Fed. 247; *Sussex Land & Live Stock Co.* v. *Midwest Refining Co.*, 294 Fed. 597.

able. We think what is said in the forepart of this opinion shows that other adequate means of identification are at hand. The district court experienced no difficulty in this regard when it made the order of approval under the first remission.

We come then to the circumstances bearing on the question of discretion. The rule was promulgated in 1912. The requirement respecting condensation and narration was not drawn from the earlier practice but was new. Its enforcement was slowly approached. For a time transgression was indulgently overlooked. Then this Court and some of the Circuit Courts of Appeals, having called special attention to the requirement, began to give effect to it.[7] The Court of Appeals for the Seventh Circuit continued to be uniformly indulgent until it came to decide this case. There may have been some scolding before, but not in the court's opinions. It was a common practice in that circuit for the judges, circuit as well as district, to direct that all the testimony be reproduced in the words of the witnesses. In so directing in this case the district court followed that practice. Of course the practice was in contravention of the equity rule and the Court of Appeals was right in giving effect to the rule by declining to examine the mass of evidence wrongly reproduced. But the court did not stop there. It also affirmed the decree, because of the transgression—and this notwithstanding the transgression was largely due to its own course of action. That was a very severe penalty to impose for action which had the court's implied sanction

[7] *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 10-11; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 173; *Houston* v *Southwestern Bell Telephone Co.*, 259 U. S. 318, 325; *Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, 132; *Brictson Mfg. Co.* v. *Close*, 280 Fed. 297, 299; *Roxana Petroleum Co.* v. *Rush*, 295 Fed. 844, 846.

up to that time. The fact is not overlooked that after the original transcript was filed the appellee called attention to the requirement for condensation and narration and asked that the rule be given effect. But regard also is had for the fact that when the transcript was remitted the district court directed the reproduction of the testimony without condensation or narration.

When the particular situation in the Seventh Circuit is considered, we think it is apparent that the Court of Appeals passed the bounds of a sound discretion in affirming the decree, because of the transgression, and that, upon proper terms, it should have remitted the transcript to the district court to the end that a further opportunity might be had to comply with the equity rule. Such a remission should still be made, care being taken to require that the proceedings under the rule be conducted with reasonable dispatch.

As the rule places the duty of condensing and narrating the evidence primarily on the appellant, and most of the proceedings since the appeal have been attributable to the failure to discharge that duty, the appellant should be required, as one of the terms of the remission, to pay into the Court of Appeals five thousand dollars for the benefit of the appellee by way of reimbursing it for counsel fees and expenses incurred in securing the elimination of the irregular and objectionable statement of the evidence; and also to pay, as one of such terms, the costs in this Court and those in the Court of Appeals up to the time our mandate reaches that court.

The decree of the Circuit Court of Appeals accordingly is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

Decree reversed.

THE STEEL TRADER.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 106. Argued December 2, 1927.—Decided January 3, 1928.

1. Under Rev. Stats., § 4527, a seaman who, having signed articles in this country for a voyage to foreign ports and return, and who, without his fault or consent, was discharged at another port in this country, after the voyage had begun but before one month's wages were earned, was entitled to recover, in addition to the wages earned, a sum equal to one month's wages, as compensation; but he cannot recover wages for the full period of the voyage. P. 390.
2. Rev. Stats., § 4527, is applicable not only where the wrongful discharge is "before the commencement of the voyage," but also if it occurs after such commencement but "before one month's wages are earned." *Id.*

13 F. (2d) 614, reversed.

CERTIORARI, 273 U. S. 680, to a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court in Admiralty, 10 F. (2d) 248, 250, awarding wages to a discharged seaman. The proceeding was *in rem*, but the decree was entered against claimant and surety as stipulators on a bond by which the ship was released from seizure.

Mr. John M. Woolsey, with whom *Messrs. George Denégre, Jas. Hy. Bruns, George Denneny*, and *Frederic R. Sanborn* were on the brief, for petitioners.

Mr. Silas B. Axtell, with whom *Mr. Eugene S. Hayford* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

November 29, 1921, at New Orleans, La., respondent Adams signed articles for services as oiler on the "Steel

* The docket title of this case is *United States Steel Products Company* v. *Adams*.

Trader" during a voyage from that city to East Indian Ports and return, at $80 per month. December 12, 1921, after the voyage began and while at Port Arthur, Texas, he was discharged without fault on his part and without his consent. He received before a Shipping Commissioner the wages earned and $80.00 more. The vessel returned to New Orleans May 19, 1922. Thereafter Adams instituted this proceeding in rem wherein he sought to recover as damages the stipulated wages from December 12, 1921, to May 19, 1922, plus $2.50 per day for subsistence. The trial court granted recovery for the amount of such wages ($414.50) less $80.00, with interest from May 19, 1922, 10 Fed. (2d) 248, 250, and the Circuit Court of Appeals affirmed that action, 13 Fed. (2d) 614.

The only matter for our consideration is the proper interpretation and construction of § 4527, U. S. Revised Statutes (§ 21, Ch. 322, Act of June 7, 1872, 17 Stat. 266) U. S. C. Title 46, § 594, which follows—

"Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

Chapter 322, Act of June 7, 1872,—sixty-eight sections—prescribes elaborate regulations concerning employment, wages, treatment and protection of seamen. *Inter-Island Steam Navigation Co.* v. *Byrne,* 239 U. S. 459, 460. Section 21 became § 4527, R. S. without material change.

The trial court held that § 4527 applies only to a wrongful discharge before commencement of the voyage.

The Circuit Court of Appeals concluded that "the language of R. S. § 4527 is consistent with an intention to treat the amount required to be paid to the wrongfully discharged seaman as compensation for the service already rendered by him"; and that payment thereof does not absolve from liability for breach of the shipping articles.

We think both courts adopted improper views. According to the plain language employed, the section in question applies where the discharge takes place before the commencement of the voyage or before one month's wages are earned. Also we think, in the specified circumstances, payment of wages actually earned, with an additional sum equal to one month's wages, satisfies all liability for breach of the contract of employment by wrongful discharge. The legislation was intended to afford seamen a simple, summary method of establishing and enforcing damages.

Mr. Conger, who reported the bill, which later became the Act of June 7, 1872, for the committee and had charge of it in the House of Representatives, there stated—"The bill is substantially the Shipping-Commissioner's Act of England [The British Merchant Shipping Act of 1854] with such changes as have been deemed necessary to adapt it to this country. . . ." Congressional Globe of March 20, 1872, p. 1836.

The Shipping Act of 1854 provides—

"Sec. 167. Any seaman who has signed an agreement, and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him,

not exceeding one month's wages, and may, on adducing such evidence as the Court hearing the case deems satisfactory of his having been so improperly discharged as aforesaid, recover such compensation as if it were wages duly earned."*

Speaking of § 167 in *Tindle* v. *Davison,* Queen's Bench Div. 1892, 66 L. T. N. S. 372, 374, Wright, J., said:

". . . The meaning of the section is that, when a seaman is improperly discharged, he is to have due compensation up to a month's wages in lieu of his right of action, unless he has earned a month's wages, in which case the section does not apply."

The word *compensation,* in § 4527, distinctly indicates that payment of a sum equal to one month's wages was intended to constitute the remedy for invasion of the seaman's right through breach of his contract of employment in the circumstances specified. "Damages consist in compensation for loss sustained. . . . By the general system of our law, for every invasion of right there is a remedy, and that remedy is *compensation.* This compensation is furnished in the damages which are awarded." Sedgwick's Damages, 9th Edition, Vol. 1, page 24. See also *Bauman* v. *Ross,* 167 U. S. 548. The provision that such sum may be recovered "as if it were wages duly earned" permits the seaman to enforce payment by the

* Sec. 162, British Merchant Shipping Act of 1894, which corresponds to Sec. 167, Act of 1854 provides:—"If a seaman, having signed an agreement, is discharged otherwise than in accordance with the terms thereof before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying that discharge, and without his consent, he shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage caused to him by the discharge not exceeding one month's wages, and may recover that compensation as if it were wages duly earned."

special and summary methods provided for collecting his ordinary wages.

In *Calvin* v. *Huntley* (1901) 178 Mass. 29, 32, we think the Supreme Court of Massachusetts properly interpreted § 4527, and in respect of it rightly said—

"It speaks not of punishment but of compensation, its object is to protect the seaman from loss rather than to punish the master for discharging him. The remedy is given to the seaman alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master for a breach of contract in which the seaman and the master or owner are the only persons interested. . . .

"Nor does the rule of damages seem unreasonable. The shipping contract calls upon the seaman to go to various places, sometimes far from home, and it may be, for instance as in this case was the actual fact, that he may be discharged in a port distant from that where he signed the articles, or where he can not immediately secure any other employment on board ship or elsewhere, and that in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract. We think the statute not penal but remedial. . . ."

The decree of the District Court must be reversed. The cause will be remanded there for further proceedings in conformity with this opinion.

Reversed.

Syllabus.

HOPKINS, ASSESSOR, ET AL. *v.* SOUTHERN CALIFORNIA TELEPHONE COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 133. Argued December 8, 1927.—Decided January 3, 1928.

1. Where a bill in the District Court to enjoin state officials from enforcing a property tax raises substantial questions as to its validity under the Fourteenth Amendment, the court has jurisdiction even though its validity under the state law is also questioned and has not been decided by the courts of the State. P. 398.
2. The District Court, having thus acquired jurisdiction as a federal court, all material questions, state or federal, are open for decision. *Id.*
3. The equity jurisdiction, also, exists in such a case if the legal remedy of paying the tax and suing to recover is doubtful under the state law, would not include interest, and would involve a multiplicity of suits. P. 399.
4. A rehearing granted by the Supreme Court of California vacates the previous opinion and judgment, and sets the whole matter at large. P. 400.
5. Under the constitution (Art. XIII, § 14) and statutes of California, telephone companies pay a state property tax upon their franchises, poles, wires and other property used exclusively in the operation of their business in the State, computed at certain percentages upon the gross receipts from such operation, and such taxes are in lieu of all other taxes upon such property of such companies. The percentages are adjusted so that this tax shall equal the average burden of taxation on other classes of property, which are subject to local taxation by counties and municipalities, and not by the State. Double taxation is forbidden. A telephone company was assessed, and paid, the full percentage of the gross receipts from the property operated by it, part of which was leased from another company. *Held*, that the leased property was not subject to county and municipal taxes assessed against the lessor. P. 400.
6. Construction of a state constitution and statutes which may create serious questions under the Federal Constitution, is to be avoided if possible. P. 403.

13 F. (2d) 817, affirmed.

CERTIORARI, 273 U. S. 685, to a decree of the Circuit Court of Appeals reversing a decree of the District Court and directing an injunction in a suit brought by the Telephone Company to enjoin the County of Los Angeles and certain of its officers from seizing and selling some 308,200 telephone "talking sets" in satisfaction of a local tax. The District Court had dismissed the bill for lack of jurisdiction.

Messrs. Everett W. Mattoon and *W. Sumner Holbrook, Jr.*, for petitioners.

A substantial federal question is alleged only when it appears that some right of plaintiff, upon which his recovery depends, will be defeated by one construction of the Federal Constitution or statute and will be sustained upon the opposite. *Starin* v. *New York*, 115 U. S. 248; *Wagner Electric Co.* v. *Lyndon*, 262 U. S. 226; *Matters* v. *Ryan*, 249 U. S. 375; *Devine* v. *Los Angeles*, 202 U. S. 313; *Bankers Casualty Co.* v. *Minn. St. P. etc., Ry.*, 192 U. S. 371; *New Orleans* v. *Benjamin*, 153 U. S. 411.

Inasmuch as the Fourteenth Amendment does not make questions of state law a constitutional right, allegations in the bill as to the validity of the tax under the State Constitution, are immaterial in so far as a federal question and jurisdiction are concerned, if the tax itself complies with the universal test of the Fourteenth Amendment.

The bill fails to allege a substantial ground of invalidity under the Fourteenth Amendment, since a double tax on the "talking sets," and consequent discrimination against property leased to public utilities, does not constitute a violation of either the Due Process Clause or the Equal Protection Clause of the Amendment. Double taxation does not of itself constitute a violation of the Fourteenth Amendment. *Swiss Oil Corp.* v. *Shanks*, 273 U. S. 407; *Shaffer* v. *Carter*, 252 U. S. 37; *Cream of Wheat Co.* v.

Grand Forks, 253 U. S. 325; *Citizens Nat'l Bank* v. *Durr,* 257 U. S. 99; *St. Louis, etc., Ry.* v. *Arkansas,* 235 U. S. 350; *Tennessee* v. *Whitworth,* 117 U. S. 129; *Fidelity & Col. Tr. Co.* v. *Louisville,* 245 U. S. 54; *Kidd* v. *Alabama,* 188 U. S. 730; *Coe* v. *Errol,* 116 U. S. 517.

A system of taxation discriminating between property leased to an operating public utility and that owned and operated by the public utility is not so arbitrary as to be in violation of the Fourteenth Amendment. *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322; *Watson* v. *Comptroller,* 254 U. S. 122; *District of Columbia* v. *Brooke,* 214 U. S. 138; *Middleton* v. *Texas Power Co.,* 249 U. S. 152; *Stebbins* v. *Riley,* 268 U. S. 137; *National Paper Co.* v. *Bowers,* 266 U. S. 373; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Northwestern Mut. Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *Kidd* v. *Alabama,* 188 U. S. 730.

Mr. Alfred Sutro, with whom *Messrs. Oscar Lawler* and *Eugene M. Prince* were on the brief, for respondents.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners are Los Angeles County, and its tax officials—assessor, deputy assessor, collector, and auditor.

Respondents are incorporated under the laws of California and in that State operate telephone systems for the transmission of local and long distance messages. For the use of patrons in Los Angeles County, they supply and maintain more than 300,000 telephone instruments. The component parts of these instruments are the receiver, transmitter and induction coil, known as the "talking set"; metal (desk) stand or wooden cabinet (for attachment to wall) which support, connect or house the talking devices; and necessary wire connections.

Talking sets are essential to the operation of any telephone system. Those associated with instruments sup-

plied by respondents are leased by them from the American Telephone & Telegraph Company, a New York corporation, which holds title thereto. The remaining parts of these instruments—stands, cabinets, etc.—and perhaps all other operating property in the systems—poles, wires, conduits, etc.—are owned by respondents.

As the statute directs, respondents made regular reports to the State Board of Equalization showing their operative property (including telephone instruments) and their gross receipts from every source. They paid to the State in lieu of taxes, or were ready to pay when due, the prescribed portions of these receipts. Without making formal objection to the inclusion in such reports of telephone instruments as operating property, the petitioning tax officers, purporting to act for the county and sixteen municipalities therein, for local purposes, assessed against the American Telephone & Telegraph Company, as owner, the value of all talking sets within that County (more than 300,000) and demanded payment of taxes thereon for 1925 at the rate borne by ordinary tangible personalty. This was not complied with and they threatened to disconnect the sets, and sell them, and thereby disrupt the systems.

Thereupon, July 17, 1925, respondents filed the original bill—afterwards amended—in the United States District Court, Southern District of California. They set forth the above stated facts, referred to the constitution and statutes of California and said no tax properly could be laid upon the leased speaking sets since all possible claim against them had been discharged through due payment to the State of the prescribed portion of gross receipts, partly derived therefrom. They alleged that these sets were not subject to local taxation; to disconnect them from respondents' systems would do irreparable harm; to enforce the demand for local taxes would violate rights guaranteed by the Fourteenth Amendment; there was no adequate

remedy at law through payment and suit to recover, or otherwise. And they asked for an injunction restraining the threatened wrong.

It appeared that for the fiscal year 1924–1925 respondent telephone companies paid to the State, out of their gross receipts, $2,080,005.72; and for the year ending June 30, 1926, would pay $2,340,075.12.

The cause was submitted "upon defendants' motion to dismiss and, in the event that said motion should be denied. then, without further hearing, for final determination upon the application for a permanent injunction as prayed in their complaint."

The District Court dismissed the bill, February 3, 1926, for want of jurisdiction. The Circuit Court of Appeals concluded correctly, we think, that there was jurisdiction; the California statutes afforded no certain adequate remedy through payment of the demanded taxes followed by suit at law to recover; the talking sets were not subject to local taxation, having been wholly relieved by payment of the gross receipts tax to the State. It accordingly reversed the decree of the trial court and directed an injunction as prayed.

Section 14, Article XIII, Constitution of California provides—

"Taxes levied, assessed and collected as hereinafter provided upon railroads, . . . ; telegraph companies; telephone companies; . . . shall be entirely and exclusively for State purposes, and shall be levied, assessed and collected in the manner hereinafter provided. . . .

"(a) . . . all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the State a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this State, computed as fol-

lows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this State. . . .

"The percentages above mentioned shall be as follows: . . . on all telegraph and telephone companies, three and one-half per cent.; [by later Legislative action increased to 5½%]. Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; . . . ."

Pertinent provisions of the Political Code are in the margin.*

Considering what this Court said in *Raymond, Treasurer*, v. *Chicago Traction Co.*, 207 U. S. 20; *Home Telephone Company* v. *County of Los Angeles*, 227 U. S. 278,

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* California Political Code

Sec. 3664a. 1. All railroad companies, . . . ; all telegraph and telephone companies; . . . shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state.

4. Such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except as otherwise provided in section fourteen of article thirteen of the constitution of this state.

Sec. 3665a. 1. The term "gross receipts from operation" as used in section three thousand six hundred sixty-four *a* of this code is hereby defined to include all sums received from business done within this state, during the year ending the thirty-first day of December last preceding, including the company's proportion of gross receipts from any and all sources on account of business done by it within this state, in connection with other companies described in said section.

Sec. 3665b. The term "operative property" as used in any section of this code shall include:

(d) In the case of telegraph and telephone companies doing business in this state: The franchises, rights of way, poles, wires, pipes,

and *Binderup* v. *Pathe Exchange,* 263 U. S. 291, we must conclude that the bill set forth claims of right under the Federal Constitution sufficiently substantial to give the trial court jurisdiction of the cause. As it acquired jurisdiction, all material questions were open for decision. *Greene, Auditor,* v. *Louisville, etc. Co.,* 244 U. S. 499.

Petitioners maintain that under §§ 3804 and 3819, California Political Code, respondents could have protected their rights by paying the assessed tax and bringing actions to recover. But whether either of these sections applies in circumstances like those here presented is far from certain. Section 3819 gives a remedy to the *owner;* and *Warren* v. *San Francisco,* 150 Cal. 167, intimates quite strongly that it applies only to actual owners. Whether the lessee who has paid taxes upon the owners' property can recover under § 3804 is also questionable. Counsel differ widely concerning the meaning of these sections and no opinion of the State court removes the doubt. In no permitted proceeding at law could in-

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conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings.

Sec. 3666. 1. If any assessor finds in the report of the operative property in his county, city and county, municipality, or district, furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as nonoperative property, or partially operative and partially nonoperative, he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. [The Board must pass upon the contest.] . . . Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company unless set aside by a court of competent jurisdiction, and each such assessor must note the *decision* on his assessment-roll, and must assess such property accordingly.

terest upon payments be recovered for the time necessary to obtain judgments. The County and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible.

Unquestionably the talking sets would have been free from local assessments if the title had been in respondents; but petitioners stoutly maintain that the gross receipts tax prescribed by the Constitution is not in lieu of local taxes upon *leased* property.

No ruling of the California Supreme Court authoritatively determines whether personal property leased by a telephone company and actually used for operating purposes is relieved from local taxation by payment to the State of the prescribed percentage of the lessee's gross receipts. July 2, 1927,—after the decision below—that court handed down an opinion which declared leased improved real estate, although actually used as operating property, was subject to local taxation. *Pacific Telephone & Telegraph Co.* v. *State Board of Equalization*, 74 Cal. Dec. 96. But rehearing was granted and this vacated "the previous opinion and judgment and set the whole matter at large." *Miller & Lux Incorporated* v. *James*, 180 Cal. 38, 48.

The argument against exemption of leased property from local taxation rests chiefly upon literal and narrow interpretation of words in § 14, Article XIII, California Constitution—". . . all telegraph and telephone companies . . . shall annually pay to the State a tax upon *their* franchises, . . . , poles, wires, pipes, canals, conduits, rights of way, and other property . . . used exclusively in the operation of their business"; and "such taxes shall be in lieu of all other taxes and licenses,

State, county and municipal, upon the *property* above enumerated *of such* companies."

But the Constitution plainly directs, "taxes levied, assessed and collected as hereinafter provided upon . . . telephone companies . . . shall be entirely and exclusively for State purposes" and such companies "shall annually pay to the State a tax upon their poles, . . . and other property, or any part thereof, used exclusively in the operation of their business." And the Political Code provides [Sec. 3664] that "taxes levied, assessed and collected as hereinafter provided upon telephone companies shall be entirely and exclusively for State purposes and shall be assessed and levied by the State Board of Equalization"; [Sec. 3664a] that "all . . . telegraph and telephone companies . . . shall annually pay to the State a tax upon their . . . poles, wires, . . . and any other property, or any part thereof, used exclusively in the operation of their business . . .;" [Sec. 3664a-4] "such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except . . .;" [Sec. 3665a] "the term 'gross receipts from operation' as used in Sec. 3664a of this Code is hereby defined to include all sums received from business done within this State;" [Sec. 3666] if an assessor finds reported as operative property in his county any which he regards as nonoperative, he shall notify the Board of Equalization within thirty days; and [Sec. 3607] "nothing in this Code shall be construed to require or permit double taxation."

Sec. 14, Article XIII, (adopted 1910) was proposed by a Commission which gave the matter much consideration and made an elaborate report. It is the result of an earnest effort to provide for enforcement of adequate contributions from public service and some other corporations while avoiding double and unjust taxation. Payment of

specified percentages (subject to change by the Legislature) of gross receipts was directed upon the theory that the value of operative property could be fairly measured by considering receipts therefrom. Also, that by paying to the State a portion of these, the corporation would, in effect, contribute for its operative property the substantial equivalent of all taxes laid upon other property. The Commission (Rep. 1910, p. 19) said—"In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission."

The Supreme Court of the State has declared the gross receipts tax is essentially one on property, *Pullman Company* v. *Richardson,* 185 Cal. 484, 487; and it apparently approves the view that "a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied." *Pacific Gas & Electric Co.* v. *Roberts,* 168 Cal. 420, 425. See *Southern Pacific Co.* v. *Levee District No. 1,* 172 Cal. 345; *Great Western Power Co.* v. *City of Oakland,* 189 Cal. 649.

The State received from respondents a sum equal to five and one-half per centum of the gross revenues derived from all operative property under their control—leased as well as owned. These did not depend upon ownership; and rent paid out was not considered.

If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would

really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while a competitor with equal receipts, by paying the same amount, might absolve from local assessments property of very large value.

These difficulties can not be avoided by saying the lessee will not pay assessments against the lessor and therefore can not complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.

Here respondents have surrendered out of gross receipts the equivalent of the burden imposed upon other property not less valuable than all the operating property in their systems; and now, unless more is paid, disruption is threatened through seizure and sale of essential instrumentalities actually employed to produce those receipts.

We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise. Without an authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation.

Affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 95. Argued November 30, 1927.—Decided January 3, 1928.

1. Paragraph 22 of § 1 of the amended Interstate Commerce Act (added by Transportation Act, 1920) which declares that the authority of the Commission conferred by paragraphs 18–21 shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, refers to tracks built by the carrier as part of its railroad and does not destroy the power of the Commission under paragraph 9 (from Act of June 29, 1906) to require switch connections with private sidings built by shippers. P. 407.
2. The mere fact that a shipper's side track with which a connection is sought extends to an industry located on another railroad will not make the switch connection or the track of the shipper, or both combined, an extension of the railroad with which the connection is sought, within the meaning of paragraphs 18 to 21. P. 408.
3. The possibility that in the future a shipper's side track may be used by carriers whose lines it crosses does not render its mere construction and operation an extension of the lines of those carriers within the meaning of paragraph 18. P. 409.
4. A rule of state law that a side track crossing a highway is a part of railroads with which it connects and subject to public use, does not require the Interstate Commerce Commission, when ordering a railroad to establish a switch connection with such a side track for use in interstate commerce, to make the findings of public convenience and necessity which are necessary in proceedings under paragraphs 18 to 21. P. 410.
5. A state court annulled an order of a state commission which required an interstate carrier to establish a switch connection with a shipper's side track on the ground that the character of the side track brought the case within the provisions of paragraphs 18 to 21, and the exclusive jurisdiction of the Interstate Commerce Commission. *Held* that this did not preclude the shipper from seeking relief, or the Commission from proceeding, under para-

graph 9 rather than paragraphs 18 to 21, where the case properly fell within the former paragraph. P. 411.

6. A shipper may be entitled to a switch connection with an interstate railroad under paragraph 9, although his siding track is already connected with another interstate railroad. P. 412.
7. The right of a shipper who has built his siding to compel a switch connection under paragraph 9, is not dependent on his having shipped over the line to be connected with. P. 413.
8. The question whether the building of a private side track by a coal corporation was in excess of its powers under the state law, is not open in a suit to set aside an order of the Interstate Commerce Commission made under paragraph 9, requiring a railroad to make a switch connection with the side track. P. 413.
9. It is the duty of the District Courts to deliver opinions expressing the grounds of their decisions in cases of this character. P. 414.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill to set aside an order of the Interstate Commerce Commission, requiring the Railway Company to construct a switch connection with a private siding or spur of a coal company.

Mr. George B. Gillespie, with whom *Messrs. H. N. Quigley* and *S. W. Baxter* were on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. Patrick J. Farrell, with whom *Mr. E. M. Reidy* was on the brief, for the Interstate Commerce Commission.

Messrs. James M. Sheean and *Clarence B. Cardy* were on the brief for J. K. Dering Coal Company.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Paragraph 9 of § 1 of the Interstate Commerce Act as amended provides that "Any common carrier subject to

the provisions of this Act, upon application of . . any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any . . private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same"; and it authorizes the Interstate Commerce Commission upon complaint and hearing to enforce performance of that duty. Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584, 585; Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 547; Act of Feb. 28, 1920, c. 91, § 401, 41 Stat. 456, 475.

J. K. Dering Coal Company, which owns a large mine located on the Illinois Central Railroad, desired a direct connection also with the railroad commonly known as the Big Four. To this end, it built a private track, about three and a half miles long, from its mine to the right of way of the Big Four. Thereafter, it applied to the Interstate Commerce Commission, under paragraph 9 of § 1, for an order requiring the Big Four to construct, maintain and operate the desired switch connection. The mine, its track and the proposed connection are wholly within the State of Illinois. Upon full hearing, the Commission found the facts which, under that paragraph, must exist before a shipper can require the railroad to construct a connection. That is, it found that the Coal Company had built its track up to the right of way of the railroad; that it had made application in writing for the connection; that it had tendered interstate traffic; that the business was sufficient to justify the construction and maintenance of the proposed connection; that the connection is reasonably practicable and can be put in with safety; and that the connection should be constructed and maintained by

the railroad. Thereupon, the Commission entered the order prayed for. *J. K. Dering Coal Co. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 96 I. C. C. 143; 109 I. C. C. 55.

The Big Four brought this suit against the United States and the Coal Company in the federal court for northern Illinois to set aside that order. The Commission intervened as defendant.[1] The case was heard before three judges upon motion for an interlocutory injunction, which was denied. Later, upon final hearing, a decree was entered dismissing the bill. That decree is here on appeal, under Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 220, and § 238 of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

The District Court did not make findings of facts, render an opinion, or indicate by recital in the decree the grounds of its decision. The abridged record occupies 492 printed pages, besides numerous exhibits. There are 21 assignments of error. And the appellant's briefs fill more than 200 pages. No irregularity in the proceedings before the Commission is suggested. It is urged that some essential findings of fact made by the Commission are without support; but the evidence is clearly ample. The claim of invalidity is rested mainly upon contentions of an entirely different nature. These are numerous; and all are groundless. But, because they are peculiar in character and novel, they must be stated in detail.

First. It is contended that the power of the Commission, under paragraph 9, to require the construction of a switch connection with a side track built by a shipper and

[1] The Illinois Central Railroad Company and the Southern Illinois Railway and Power Company were also joined as defendants; but as to them the bill was dismissed, on motion of plaintiff, before entry of the decree under appeal.

located wholly within one State, was abrogated by paragraph 22, which was added to § 1 of the Interstate Commerce Act by Transportation Act, 1920. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 478. Paragraph 22 declares: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State. . . ."

Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier. Compare *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 345; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244, 249. In denying their application to side tracks or spurs, paragraph 22 refers to tracks built by the carrier as a part of its railroad. Compare *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 285, 290. Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper. The power to compel such had been granted to the Commission by the Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584, 585. Furthermore, Congress gave explicit proof that in adding paragraph 22 to § 1, it meant to leave paragraph 9 unaffected. For Transportation Act, 1920, provided specifically that the paragraph concerning switch connections, which as it then stood was unnumbered, should (without change) be numbered 9. Act of February 28, 1920, c. 91, § 401, 41 Stat. 456, 475.

Second. It is contended that if the authority given the Commission by paragraph 9 was not abrogated by the en-

actment of paragraph 22, its exercise in the present case was subject to the requirements of paragraphs 18 to 21, and that the Commission's order is void for non-compliance therewith. The contention has two phases. In the first place, it is said that if the switch connection is made, the side track, by enabling the Big Four to reach into territory hitherto served wholly by another carrier, will become an extension of its lines within the meaning of paragraph 18. Compare *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Marion & Eastern R. R. Co.* v. *Missouri Pacific R. R. Co.*, 318 Ill. 436, certiorari denied, 271 U. S. 661. This argument proceeds from the same misconception of the purpose of paragraphs 18 to 21 as does the argument discussed above. These paragraphs deal with construction and abandonment on the part of the carrier, not with side tracks built by the shipper. Furthermore the order gave the Big Four no trackage rights over the Coal Company's track. The mere fact that a side track with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the track of the shipper, or both combined, an extension of the railroad within the meaning of paragraphs 18 to 21.

The Big Four appears to place greater reliance on the other phase of the contention. The Coal Company's track crosses at grade, in addition to three highways, the tracks of the Illinois Central and the Southern Illinois. There is an agreement between these carriers and the Coal Company under which, by means of appropriate switch connections which it is physically possible to make, trains from these other lines could pass over the track, and thus, as is contended, tap territory now tributary to the Big Four. The argument is that because of the possibilities of the use of the track by these other carriers, it is an extension within the meaning of paragraph 18. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*,

supra. But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of § 1 furnishes the appellant with an appropriate remedy. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra.*

Third. It is contended that, regardless of the fact that the order of the Commission provides only for a switch connection with the siding of the Coal Company, the siding must be regarded as an extension within the meaning of paragraphs 18 to 21, because under the law of Illinois, all tracks which cross highways are deemed public tracks, and this track crosses highways. It is true that, under § 45 of the Public Utilities Act of the State, Cahill's Illinois Revised Statutes (1925), Chap. 111a, par. 60, a switch track, though built by an industry and used in connection with it, is a part of the railroad subject to public use. *Public Utilities Commission* v. *Smith,* 298 Ill. 151; *St. Louis, Springfield & Peoria R. R.* v. *Commerce Commission,* 309 Ill. 621. But, obviously, a State cannot, in respect to the regulation of interstate commerce, override the will of Congress. *Napier* v. *Atlantic Coast Line,* 272 U. S. 605. The Commission was given the authority to compel an interstate carrier to construct a switch connection with a side track built by an industry. The State cannot curtail the Commission's power over interstate commerce by denying it authority to compel a connection with such a side track unless the circumstances are such that public necessity and convenience require an extension of the railroad under paragraphs 18 to 21. Compare *Colorado* v. *United States,* 271 U. S. 153; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.,* 271 U. S. 244. As the Commission said, when making the

order: "We, of course, are not concerned with the character of the track with respect to intrastate commerce." 109 I. C. C. 55, 57.

Fourth. It is contended that the Coal Company is estopped by certain proceedings in the state courts from denying that the track from the mine to the right of way of the Big Four is an extension, within the meaning of paragraphs 18 to 21. The facts relied upon, so far as material, are these. In 1922, the Coal Company applied to the Illinois Commerce Commission for leave to build this track, and later prayed that its use be limited to a private minelead track. The Big Four challenged the Commission's jurisdiction, on the ground that the proceeding was one to compel the connection or extension of interstate carriers and was within the exclusive control of the Interstate Commerce Commission. The Illinois Commerce Commission overruled the challenge, found for the petitioners on the merits, and, at their request, provided in its orders that the track when built and connected with the Big Four should not be used for any other purpose than to serve the mine of the Coal Company, until permission for further use should be granted by the Illinois Commission. Thereupon, the Big Four assailed the orders of the state commission in the circuit court for Saline County and was defeated there. After the validity of the orders had been affirmed by that court the track was constructed. Later, the Supreme Court of the State, reviewing the circuit court's decision, held the order of the state commission void, on the ground, urged by the Big Four, that, in spite of the limitation in the orders, the track would be, under the law of Illinois, a public track, and, hence an extension of the railroads within the meaning of paragraphs 18 to 21; and that since the carrier was engaged in interstate commerce, the jurisdiction to compel construction of the switch vested in the Interstate

Commerce Commission, *C., C., C. & St. L. Ry. Co.* v. *Commerce Commission*, 315 Ill. 461, 476. That court said:

"This section [45 of the State Utilities Act] cannot be held to apply to situations coming under the Federal Transportation act. As to such the latter act is supreme. Nor can it be said that the legislature in enacting section 45 sought to confer on the Illinois Commerce Commission jurisdiction of those matters coming under the Federal Transportation act. The steam railways involved here are interstate carriers. That which amounts to an extension of their lines is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction."

The Big Four, having, thus, convinced the state court that the order of the state commission was void because the matter is one within the jurisdiction of the federal commission, insists now that the latter cannot act because of the state decision. The judgment of the highest court of the State is, of course, conclusive in so far as it declares that the state commission exceeded its statutory powers. But, obviously, neither the legislature nor the courts of a State can limit the power of the Interstate Commerce Commission to compel connections with private side tracks. The declaration of the state court that the track which the federal authority determines is private, shall be deemed public, can not affect the validity of the order of the Interstate Commerce Commission. If it could, construction by the railroad of the switch connection with the shipper's track would not be compellable under either state or federal law. Compare *United States* v. *New York Central R. R. Co.*, 272 U. S. 457, 459.

Fifth. It is contended that the Coal Company is not, within the meaning of paragraph 9, a "shipper" on the Big Four, because its mine was already connected with the Illinois Central. The argument is that Congress did not intend to give a shipper the right to a direct connection

with more than one railroad. There is nothing in the Interstate Commerce Act which justifies such a limitation of the general language of paragraph 9. Coal mines are often connected with more than one railroad. Compare *United States* v. *New River Co.*, 265 U. S. 533; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286, 287; *Dering Mines Co.* v. *Director General*, 62 I. C. C. 265; *Fairmont & Cleveland Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 62 I. C. C. 269; *Bell & Zoller Coal Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 74 I. C. C. 433.

Sixth. It is contended that the Coal Company is not a shipper on the Big Four, within the meaning of paragraph 9, because up to the time of the application to the Commission it had not actually shipped coal by this route over the Big Four. The argument is that no one, unless he is already a shipper at the time of the application to the Commission, is entitled to a switch connection. Congress imposed no such limitation. It safeguarded the expenditures of the carrier by other provisions. It limited the railroad's obligation to the building of the switch connection, leaving the burden of building the side track upon the shipper. *Winters Metallic Paint Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 16 I. C. C. 587; *Ralston Townsite Co.* v. *Missouri Pacific Ry. Co.*, 22 I. C. C. 354; *National Industrial Traffic League* v. *Aberdeen & Rockfish R. R. Co.*, 61 I. C. C. 120, 121; *Certain-Teed Products Co.* v. *Chicago, R. I. & Pac. Ry. Co.*, 68 I. C. C. 260, 263. And the railroad cannot be ordered to build the switch until after the shipper has built the private siding. *Virginia Coal & Fuel Co.* v. *Norfolk & Western Ry. Co.*, 55 I. C. C. 61; *Schlicher* v. *Director General*, 62 I. C. C. 181, 186.

Seventh. It is contended that the Coal Company is not a shipper on the Big Four, within the meaning of paragraph 9, because the railroad can be compelled to build the connection only with a "private side track which may

be constructed to connect with its railroad," and the track of the Coal Company, if a private track, could not be legally constructed. The argument is that, under the law of Illinois, only a public track may cross a highway; that an Illinois mining corporation has no power to build a public track; that since the Coal Company is an Illinois corporation the construction of the track was *ultra vires;* that hence, whether the track be public or private, it is an illegal structure; and that consequently it is not a track "which may be constructed" within the meaning of paragraph 9. Congress obviously did not impose upon the Interstate Commerce Commission the duty of determining, before issuing an order, whether or not a private track actually in existence had been constructed by the shipper *ultra vires.* Whether in so acting, the shipper transgressed powers conferred upon it by the State is a question which cannot be raised in this suit. If the State concludes to question the legality of the shipper's acts, it must do so in a direct proceeding instituted by it for that purpose, *Kerfoot* v. *Farmers & Merchants Bank,* 218 U. S. 281, 287.

Thus, all the contentions of the Big Four are clearly unfounded. The District Court properly refused to grant a stay of the Commission's order pending an appeal. It is difficult to believe that the appeal would have been persisted in, if that court had delivered an opinion setting forth its reasons for dismissing the bill. Where the trial court omits to state the grounds of its decision, the appellate court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court. Thus, both the litigants and this Court are subjected to unnecessary labor. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 675. See also *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588; *Arkansas Railroad Commission* v. *Chi-*

cago, Rock Island & Pacific R. R. Co., 274 U. S. 597; *City of Hammond* v. *Schappi Bus Line*, *ante*, p. 164; *City of Hammond v. Farina Bus Line & Transportation Co.*, *ante*, p. 173.

Affirmed.

EMERGENCY FLEET CORPORATION, UNITED STATES SHIPPING BOARD *v.* WESTERN UNION TELEGRAPH COMPANY.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 113. Argued December 2, 5, 1927.—Decided January 3, 1928.

1. The Fleet Corporation is a department of the government within the meaning of the Post Roads Act, and therefore entitled to the reduced rates fixed by the Postmaster General for telegraphic messages sent over the lines of companies which accepted its provisions, to officials and agents of government departments or to private parties on government business. Pp. 417, 426.
2. The practical construction of the Act in this regard is decisive of its meaning. P. 418.
3. The facts that the Fleet Corporation is in form a private corporation, that in sending messages it contracted on its own behalf and is suable on such contracts by the telegraph company, and that it competes in some of its operations with private shipping, *held* not inconsistent with its being a department of the government within the Post Roads Act in view of its relations, functional and fiscal, to the United States and considering that, if it paid full commercial rates, the burden would fall upon the government. Pp. 422–24.
4. The Act of June 18, 1910, in broadening the Interstate Commerce Act so as to include telegraph companies, did not abrogate or modify the scope or effect of the Post Roads Act with respect to the allowance of reduced rates to the government. P. 425.

13 F. (2d) 308, reversed.

CERTIORARI, 273 U. S. 681, to a judgment of the Court of Appeals of the District of Columbia, which affirmed a judgment recovered by the Telegraph Company from the Fleet Corporation in the Supreme Court of the District

of Columbia for the difference between the commercial and government rates on telegrams sent by the corporation.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell, Mr. Chauncey G. Parker,* General Counsel, U. S. Shipping Board, *Mr. Ralph H. Hallett,* Assistant Counsel, U. S. Shipping Board, and *Mr. O. P. M. Brown,* Special Counsel, U. S. Shipping Board, were on the brief, for petitioner.

Mr. John W. Davis, with whom *Messrs. Francis R. Stark* and *Paul E. Lesh* were on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

By Post Roads Act, July 24, 1866, c. 230, 14 Stat. 221; Rev. Stat. §§ 5263–5266, the United States offered privileges of great value to any telegraph company which should elect to accept its provisions. In return, it required, by § 2 of the Act: "That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General." Each year since the passage of the Act the government rates have been so fixed. For the fiscal years beginning July 1, 1921, and July 1, 1922, they were fixed for domestic telegrams substantially at 40 per cent of the commercial rate; and for cablegrams at 50 per cent of the commercial rate.

The Western Union accepted the provisions of the Act on June 8, 1867. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, 4; *Telegraph Co.* v. *Texas,* 105 U. S. 460. The Fleet Corporation was organ-

ized April 16, 1917. From that date to May, 1922, it was accorded, without question, the government rate on all messages sent by it. Then the Western Union claimed the right to the commercial rates for all its messages. The claim was resisted. Thereafter, messages of the Fleet Corporation continued to be marked by it "Government rate"; but they were received under an agreement that the acceptance of the message and of payment therefor at the government rate should be without prejudice to the right of the Western Union to recover the additional amount claimed. This suit was brought, in the Supreme Court of the District of Columbia, to recover, for the months of June and July, 1922, the difference between the amount paid and the commercial rate. Of this amount, $1,071.16 was for messages sent to some official or agent of the Fleet Corporation or of the Shipping Board or to some other department or official of the Government; $336.43, for messages addressed to private persons. A stipulation waiving the jury was filed; the case was heard on an "Agreed Statement of Facts"; the court found the facts to be as there stated; and a judgment entered for the full amount was affirmed by the Court of Appeals for the District. 13 F. (2d) 308. This Court granted a writ of certiorari, 273 U. S. 681.

The question whether messages transmitted for the Fleet Corporation after May 31, 1922, shall be paid for at the commercial rates or at the lower government rates is one of statutory construction. The Post Roads Act had been in force, without amendment, more than 55 years before the transactions here involved. Throughout that period, the rights of the Government and the Western Union concerning the transmission of messages had been governed by the Act, unaffected by any special contract; and there had been a uniform practice in applying it. That practice should be stated before discussing the specific facts relating to the Fleet Corporation. For the

construction given to the Act by the United States and acquiesced in by the Western Union, having been both contemporaneous and thereafter consistently and widely applied, is not only persuasive but, in our opinion, decisive of the case. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615. Compare *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510.

Continuously since June 8, 1867, the Western Union has extended the right of priority in transmission and the government rate, not only to each of the Great Executive Departments presided over by a member of the Cabinet (and to the several bureaus, divisions and officers thereof), but also to the Judicial and the Legislative branches, to the government of the District of Columbia, and to the following corporations existing at the time of the passage of the Post Roads Act: the Smithsonian Institution, organized pursuant to Act of August 10, 1846, c. 178, 9 Stat. 102, and the National Home for Disabled Volunteers, organized pursuant to Acts of March 3, 1865, c. 91, 13 Stat. 509, and March 21, 1866, c. 21, 14 Stat. 10. The Western Union has also extended, from time to time, the same preferences to at least the following minor independent departments established after the date of the acceptance by it of the provisions of the Post Roads Act: Civil Service Commission, Act of January 16, 1883, c. 27, 22 Stat. 403; Interstate Commerce Commission, Act of February 4, 1887, c. 104, 24 Stat. 379, 383; Bureau of American Republics (now the Pan-American Union), Act of July 14, 1890, c. 706, 26 Stat. 272, 275; Panama Canal, Act of April 28, 1904, c. 1758, 33 Stat. 429; Federal Reserve Board, Act of December 23, 1913, c. 6, 38 Stat. 251, 260; Federal Trade Commission, Act of September 26, 1914, c. 311, 38 Stat. 717; Inter-American High Commission, United States Section, Act of February 7, 1916, c. 20, 39 Stat. 8; Bureau of Efficiency, Act of February 28, 1916,

c. 37, 39 Stat. 14, 15; United States Shipping Board, Act of September 7, 1916, c. 451, 39 Stat. 728, 729; United States Employees' Compensation Commission, Act of September 7, 1916, c. 458, 39 Stat. 742, 748; United States Tariff Commission, Act of September 8, 1916, c. 463, 39 Stat. 756, 795; Federal Board for Vocational Education, Act of February 23, 1917, c. 114, 39 Stat. 929, 932, Alien Property Custodian, Act of October 6, 1917, c. 106, 40 Stat. 411, 415; United States Railroad Administration, Act of March 21, 1918, c. 25, 40 Stat. 451, 455; War Finance Corporation, Act of April 5, 1918, c. 45, 40 Stat. 506; United States Interdepartmental Social Hygiene Board, Act of July 9, 1918, c. 143, 40 Stat. 845, 886; Railroad Labor Board, Act of February 28, 1920, c. 91, 41 Stat. 456, 470; Federal Power Commission, Act of June 10, 1920, c. 285, 41 Stat. 1063; General Accounting Office, Act of June 10, 1921, c. 18, 42 Stat. 20, 23; Veterans' Bureau, Act of June 7, 1924, c. 320, 43 Stat. 607, 608. So far as appears by the record, there has been no denial of the government rate at any time to any department, office, or division of the Government as organized, except that to the Fleet Corporation here in question.

The extension of the government rate to each of the above named departments was made by the Western Union, as a matter of course, upon application therefor by the Government and has been continued ever since. The government rate was applied to all messages sent on official business of the Government and chargeable to any of the departments named, whatever the nature of its organization, whatever its functions, and whatever the character of the official business. In extending priority and the lower rates, no distinction has ever been made between messages sent to persons within the several departments and those outside. And, obviously, the im-

portance to the United States of securing both priority and the lower rate for official messages sent by it, is the same whoever the addressee. Messages sent by the Government, but not on official business exclusively, have been paid for by the private person interested; and the payment has been made at the commercial rate.[1]

The Western Union has never questioned the right of the Shipping Board to the government rate on any official messages sent by it. It concedes that all the messages here in question relate to activities which the Shipping Board itself might legally have conducted; that all the messages were sent on its official business; that the Board was authorized by Congress to employ the Fleet Corporation as its agency to perform the particular activities in connection with which they were sent; that the messages were not to be paid for out of any segregated portion of Fleet Corporation money; that payment of the commercial rates would involve, indirectly, an additional charge on the public treasury; and that, so far as concerns the character of the message or of the business, the government rate was chargeable for all the messages, if for any of them. The claim that the government rates do not apply to messages of the Fleet Corporation is rested in part upon the fact that it is, in form, a private corporation; in part upon the fact that it is an agency of the Shipping Board, as distinguished from a bureau or division; in part upon the fact that, to a considerable extent,

[1] Thus, a Treasury Regulation, adopted April 2, 1918, provides: "(10) Government telegraph rates, established conformably to law, are intended to apply to official Government business exclusively, and no private individual, association, company, or corporation should in any way be benefited thereby. In cases where it becomes necessary to use the telegraph on any business in the special interest of any private person or persons, in which the Government has no interest, the party for whom the service is performed will be required to pay for the messages both ways at commercial rates." T. D. 37588.

it is engaged in a business which involves competition with private ship owners. These arguments do not support the claim; but they make necessary a statement of the facts concerning the organization and activities of the Fleet Corporation.

The Fleet Corporation was organized by the United States Shipping Board pursuant to specific authority conferred by the Act of September 7, 1916, c. 451, § 11, 39 Stat. 728, 731. The legislation concerning it, its relation to the Shipping Board, its character and the scope of its activities are shown in *The Lake Monroe,* 250 U. S. 246; *United States* v. *Strang,* 254 U. S. 491; *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549; *United States* v. *Walter,* 263 U. S. 15; and *United States ex rel. Skinner & Eddy Corporation* v. *McCarl, ante,* p. 1. Besides powers conferred upon the Fleet Corporation by the general corporation law of the District of Columbia, it was vested, by delegation from the President, with the powers conferred upon him by Acts of June 15, 1917, c. 29, 40 Stat. 182; April 22, 1918, c. 62, 40 Stat. 535; and November 4, 1918, c. 201, 40 Stat. 1020, 1022. Executive Orders, No. 2664, July 11, 1917; No. 2888, June 18, 1918; No. 3018, December 3, 1918; No. 3145, August 11, 1919. These specific powers and duties were transferred to the Shipping Board by Merchant Marine Act, 1920, June 5, 1920, c. 250, 41 Stat. 988.

Since the passage of the Merchant Marine Act, 1920, the Fleet Corporation has been the agency through which the Shipping Board has performed its principal functions. The activities have consisted largely of maintaining and liquidating property acquired for the United States during the World War, of settling claims arising therefrom, and of operating, or causing to be operated, vessels not disposed of. Besides other activities, the Fleet Corporation

has operated directly, and has been interested in the operation of, vessels owned by the United States. Some of these government vessels have been operated in competition with American vessels privately owned. But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

First. It is argued that the government rate should be denied because the Fleet Corporation is a private corporation. In form, it is such. But all of its $50,000,000 capital stock was subscribed and paid for by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone has had a financial interest in its capital stock. The United States alone has contributed the additional money needed from time to time for the conduct of its business. The Fleet Corporation has, of course, received from others moneys in payment for property sold, as charter hire, for shipping services, or in settlement of claims. But, as the business of the Fleet Corporation has been conducted continuously at a large loss, the sums so received did not supply capital. They served merely to reduce, to that extent, the amount of the deficit being incurred and, hence, the amount of the additional money which the United States was required to contribute.[2] Payment by the

[2] For the fiscal year ending June 30, 1921, the Shipping Board reported a total excess of outgo over income (exclusive of appropriations) of $188,291,441.05. Annual Report of United States Ship-

Fleet Corporation of the commercial rate for messages would necessarily increase the charges upon the public treasury to the same extent, and in the same manner, as would the charge of the commercial rate in respect to the business done for the United States directly by the Shipping Board or that done for it by some other department of the Government. An important, if not the chief, reason for employing a corporate agency was to enable the Government to employ commercial methods and to conduct the operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure and with its control over the financial operations of the United States. *United States ex rel. Skinner & Eddy Corporation* v. *McCarl, ante,* p. 1. It obviously was not the intention of the Government in employing a corporate agency to deprive itself of the right of priority of transmission and of the lower rate secured through the Post Roads Act.

Second. It is argued that in sending a message the Fleet Corporation contracted on its own behalf; that this contract gave to the Western Union the right to sue the corporation; and that by such contract there was secured the right to rely upon the credit of the corporation and to satisfy the debt out of its properties. All this may be admitted; but it affords no reason for denying that the Fleet Corporation is a department of the United States within the meaning of the Post Roads Act. Actually, the Fleet Corporation had no individual credit. As an agency of the Shipping Board it had control of certain properties and moneys required in the conduct of its

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ping Board, 1921, p. 321. For the year ending June 30, 1922, the Board's excess was $56,374,951.22; that of the Fleet Corporation, $81,547,600.86. Annual Report, 1922, p. 238. In the year ending June 30, 1923, the excess for the Shipping Board and all its subsidiaries was $15,231,630.30; that for the Fleet Corporation taken alone, $41,682,514.86. Annual Report, 1923, p. 168.

business. But it had no actual capital. Long before June 1, 1922, the $50,000,000 which the United States supplied in payment of the capital stock, had been sunk in the business.[3] By, and pursuant to, Merchant Marine Act, 1920, the title to most of the property used by the Fleet Corporation was transferred to the Shipping Board or to the United States. All moneys other than amounts needed for current operation are required to be covered into the Treasury of the United States. The Fleet Corporation has had no means of paying either the large outstanding claims against it or of paying the deficits continuously being incurred, other than the moneys supplied by the United States through the annual appropriations. It is, of course, immaterial that the charge upon the public treasury is an indirect one; and the fact that the Fleet Corporation receives some gross income from shipping services is also without legal significance. Many departments receive fees, or some other form of compensation, for services rendered to private persons. See 14 Opinions of the Attorney-General, 278.

Third. It is argued that the Fleet Corporation should be denied the government rate, because it competes, in respect to some of its operations, with private shipping. But in operating ships it is performing a function of the Government. The conduct of business in competition

[3] The total receipts from appropriations and allotments to June 30, 1921, were $3,310,170,576.98. The net assets then on hand (after deducting current and capital liabilities, reserves for depreciation, etc.) were $1,929,847,381.84. Thus, the loss to date, as estimated by the Shipping Board, was $1,380,323,195.14. Annual Report of United States Shipping Board, 1921, pp. 309-321. By June 30, 1923, the total appropriated and allotted had grown to $3,491,912,648.01, while the Shipping Board's estimate of the net worth of the assets belonging to it and its subsidiaries had shrunk to $292,405,200.17, showing a loss of $3,199,507,447.84. Annual Report, 1923, pp. 192-196. The estimates for June 30, 1927, show a net worth of $290,461,593.91, making a net loss of $3,271,021,167.61 on the total appropriations ($3,561,482,761.52) to that date. Annual Report, 1927, pp. 121–124.

with private interests may of course, be for a public purpose, *Standard Oil Co.* v. *City of Lincoln* (*post*, p. 504). Other departments which compete with private business have long enjoyed the government rate without question. The Post Office has since 1872 competed with bankers through money orders; since 1910 with savings banks by receiving deposits on interest; since 1913 with express companies through the parcel post. The War Finance Corporation has since 1918 competed with the private bankers. The War Department has by its Mississippi River barge lines competed since 1920 with the railroads. Equally with all of these, the Fleet Corporation is acting for and on behalf of the United States.

Fourth. It is faintly argued that the Western Union is entitled to the commercial rates, because, since the Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544, which broadened the scope of the Act to Regulate Commerce so as to include telegraph companies, telegraph rates are no longer a matter of contract; that they have the force of law, *Western Union Telegraph Company* v. *Esteve Brothers & Co.*, 256 U. S. 566, and that any deviation from the lawful rate would involve an undue preference to the Government and an unjust discrimination against its competitors, the private shipping concerns. It may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government preferential rates. Compare *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318. But it is a sufficient answer to say that it clearly was not the intention of Congress by the Act of 1910 to abrogate or modify the scope or affect the application of the Post Roads Act.

Fifth. It is urged that if the Fleet Corporation is granted the government rate, it may likewise be claimed by every instrumentality of the Government. Instrumentalities like the national banks or the federal reserve

banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest. Compare *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907. The Fleet Corporation is entitled to the government rate, not because it is an instrumentality of the Government, but because it is a department of the United States within the meaning of the Post Roads Act. In respect to messages sent, on the Government's business, no distinction can properly be made between those of the Shipping Board and those of the Fleet Corporation.

Reversed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* AEBY.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 100. Argued December 1, 1927.—Decided January 3, 1928.

1. A station platform intended for use and used by a station agent in the performance of his duties, is part of the "works" of the railroad company within the meaning of the Federal Employers' Liability Act, § 1. P. 428.
2. A case under the Act is governed by it and the applicable principles of common law as applied in federal courts; and there is no liability in the absence of negligence on the part of the carrier. P. 429.
3. A railway station platform, composed of loose gravel and crushed stone, became worn and depressed in front of steps leading from the station, due to rainwater falling from the roof and draining from the platform and to the passage of people to and from the waiting room. Water accumulated in the depression when it rained, and on the night in question, a puddle, so formed, was frozen and covered with snow. Plaintiff slipped on the ice while seeking to enter the station house in the dark in pursuit of her duties as station master, and was injured. *Held* that the facts were insufficient to sustain a finding that the railroad company had failed in any duty to the plaintiff. *Id.*

313 Mo. 492, reversed.

CERTIORARI, 273 U. S. 679, to a judgment of the Supreme Court of Missouri, which affirmed a recovery of damages for personal injuries in an action under the Federal Employers' Liability Act.

Mr. Merritt U. Hayden, with whom *Messrs. Edward J. White, James F. Green* and *Thomas J. Cole* were on the brief, for petitioner.

Mr. Patrick H. Cullen, with whom *Messrs. Thomas T. Fauntleroy, Augustus L. Abbott, John B. Edwards,* and *John C. Vogel* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner is a common carrier of interstate commerce by railroad. Respondent was its station agent at Magness, Arkansas; and, January 13, 1921, while employed in such commerce, fell on the station platform and was injured. She brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Federal Employers' Liability Act, U. S. C., Tit. 45, c. 2, § 51, on the ground that her injuries resulted by reason of a defect or insufficiency in the platform due to petitioner's negligence. The jury returned a verdict, and the court entered judgment thereon, in her favor. Petitioner took the case to the Supreme Court and contended that the platform was not a part of its "works" within the meaning of the Act; that the evidence was not sufficient to sustain a finding that petitioner was guilty of actionable negligence; that respondent assumed the risk, and that her own negligence was the sole cause of her injuries. That court decided all these questions adversely to the petitioner and affirmed the judgment. 313 Mo. 492. Certiorari was granted, 273 U. S. 679.

The Act makes the carrier liable for injuries resulting to its employees by reason of any defect or insufficiency due

to its negligence in "its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The language is broad and includes things and places furnished by the carriers to be used by their employees in the performance of their work. The platform was intended to be and was used by respondent to do station work. Having regard to the beneficent purposes of the Act, it would be unreasonable to hold that when so used a station platform is not covered by the word "works" in the above quoted provision. The Supreme Court rightly held that the clause applied.

Respondent had lived for years in that part of Arkansas. She was petitioner's ticket agent at Morefield from March 20, 1919, until July 2, 1920; then she became the station agent at Magness and remained in that position until a few days after she was injured. She had charge of the station; did book work; sold tickets; handled mail, baggage, express, etc. She was the only person regularly performing station work; and, for some time before the accident, she lived in the station building. It was a one-story structure 16 feet wide by 48 feet long located south of, parallel to and 10 feet from the track. The waiting room occupied the west end, and adjoining it there was an office having a bay window toward the track. The waiting room door, in front of which were two steps, was just west of the bay window. The platform was made of "chat," described as small gravel and crushed stone. It was something like a cinder path. There were no gutters on the eaves and water falling from the roof made a depression or kind of ditch. The chat was loose and sloped toward the building, and some of the rain falling on the platform, as well as the water from the roof, reached the depression under the eaves and drained past the steps to the west. The depression was about four inches deep; and, by reason of the slope, its bottom was about 12 inches lower than the highest part of the platform. The depres-

sion existed when respondent came to work at Magness, and in front of the steps it was about four feet square. That condition was caused by water and the passage of people going to and from the waiting room. When it rained, there accumulated in this and other depressions on the platform puddles of water which gradually disappeared. By the time of the accident, the depression in front of the steps had become somewhat larger and deeper by reason of rains and constant use. Its surface was rough. No ice had formed there after respondent came. The platform was dry the evening before the accident. During the night it rained, froze and snowed. Respondent and another woman slept in the station. A train was due shortly after six in the morning. They got up about six; it was dark; respondent lit a lamp and also a lantern that was kept for use about the place. They went out and moved the truck from the west end of the building to a place near the track. The steps were covered with snow and ice. There was about three inches of snow on the platform; the truck was frozen to the ground and covered with ice. There was no light on the platform. The lamp and lantern were left inside, and it does not appear that either was placed to give light through the bay-window or otherwise upon or about the steps or platform. Going out, respondent stepped off the west end of the steps. When returning to the waiting room, she approached from the north. There was ice under the snow immediately in front of the steps; she tripped on something rough, slipped, fell and was injured.

This case is governed by the Act and the applicable principles of common law as established and applied in federal courts. There is no liability in the absence of negligence on the part of the carrier. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 150. Its duty in respect of the platform did not make petitioner an insurer of re-

spondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances. *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 664; *Washington &c. Railroad Co.* v. *McDade*, 135 U. S. 554, 570; *Tuttle* v. *Milwaukee Railway*, 122 U. S. 189, 194. The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 529. No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. *National Biscuit Co.* v. *Nolan*, 138 Fed. 6, 12. It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. The obligation in respect of station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business is greater than that due their employees accustomed to work thereon. The reason is that the latter, familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers. *Tuttle* v. *Milwaukee Railway*, 122 U. S. 194. The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed

to her. *Nelson* v. *Southern Ry. Co.*, 246 U. S. 253. As negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent.

Judgment reversed.

N. & G. TAYLOR COMPANY, INC., *v.* ANDERSON ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 114. Argued December 5, 1927.—Decided January 3, 1928.

1. Section 18 of the Illinois Practice Act, allowing the assignee of a non-negotiable contract to sue on it in his own name and requiring him to show on oath his ownership and source of title, will be applied by the federal courts sitting in that State. P. 437.
2. By the law of Illinois, as established by the State Supreme Court, a declaration under § 18 *supra* that does not make the required showing as to ownership and source of title, fails to state a cause of action; and a cause of action set forth in a declaration amended to comply with the section is barred if the period fixed by the statute of limitations has expired when the amended declaration is filed. P. 437.
3. Section 954 of the Revised Statutes governing amendments in the federal courts, is to be liberally construed. P. 438.
4. Where the filing of an amended declaration has been allowed under § 954, the question whether the declaration states a new cause of action barred by the statute of limitations, depends upon the substance of the change made by the amendment. P. 438.
5. A partnership made a contract to purchase oil and vendors defaulted. The members of the partnership formed a corporation, named as the partnership was with the word "Incorporated" added, which took over the firm's assets and liabilities, including the contract, and carried on the business. The corporation sued on the contract in the federal court sitting in Illinois, describing it as one made with the corporation directly, without mention of the partnership, and later, when the period of the

statute of limitations had expired, filed an amended declaration claiming as assignee. *Held* that the amendment was not one of form, which could relate back to the beginning of the action, but substituted a new cause of action barred by the statute. P. 439.
14 F. (2d) 353, affirmed.

CERTIORARI, 273 U. S. 681, to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court sustaining a plea of the statute of limitations in an action on contract brought in Illinois by a Maryland corporation.

Mr. Henry S. Drinker, Jr., with whom *Messrs. Robert W. Childs, Walter E. Beebe,* and *Edwin A. Lucas* were on the brief, for petitioner.

Admittedly plaintiff's declaration, as amended, fully satisfied the requirements of the local practice, as construed by the Illinois courts. The Illinois decisions which the majority of the court below felt bound to follow did not involve the construction of § 18 of the Practice Act, which is too clear for construction; but dealt with the question as to what constitutes a different cause of action—a matter of general fundamental law—and with the effect of amendments—a matter regulated by the federal statutes.

Federal courts are not bound by state decisions relative to the allowance and effect of amendments. The federal courts recognize that there may be both a defective and a proper statement of the same cause of action, and that the insertion of an allegation which did not "set up any different state of facts as the ground of action," *M. K. & T. R.* v. *Wulf,* 226 U. S. 570, did not state a new cause of action, but "merely expanded or amplified what was alleged in support of the cause of action already asserted." *N. Y. Central Ry.* v. *Kinney,* 260 U. S. 340

The power of the courts of the United States to allow amendments, and the liberal practice adopted by them in

exercising this power, do not depend on state statutes or on state practice. *Bowden* v. *Burnham,* 59 Fed. 752; *Mexican Cent. Ry.* v. *Duthie,* 189 U. S. 76; *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214; *Norton* v. *Larney,* 266 U. S. 511.

Amendments, when allowed, relate back to the date of the filing of the pleading which they amend. *Missouri etc. R. R. Co.* v. *Wulf,* 226 U. S. 570; *Underwood Co.* v. *Davies,* 287 Fed. 776.

The present cause of action accrued direct to the plaintiff corporation, which stepped into the shoes of the partnership while the contract was being performed and before the breach was complete, and took the place of the partnership in the performance of the contract. It was not until March 20, 1917, when plaintiff refused further to condone defendants' scanty deliveries and wrote that they would buy this oil elsewhere, that this cause of action accrued, and it then accrued to the corporation.

There was no assignment to a distinct third party. The two partners merely changed the form of their organization. Even this change was complete before the final breach by defendants, which breach was with the plaintiff corporation.

When a defendant, from the institution of the suit, has been fully advised by the pleadings as to the particular transaction on which the claim is based, the federal courts do not permit him to defeat a just claim merely because of the original omission of some fact, which, while necessary to a complete technical cause of action or required to make the pleadings conform to state practice, was totally unnecessary to advise defendant adequately of the essential nature and basis of the claim. Cf. *American R. R.* v. *Birch,* 224 U. S. 547; and *M. K. & T. Ry.* v. *Wulf,* 226 U. S. 570. See also *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214; *Friederichsen* v. *Renard,* 247 U. S. 207; *N. Y. Cent.*

R. R. v. *Kinney,* 260 U. S. 340. These decisions of this Court make it clear that the assertion by suit of the cause of action, effective to toll the statute, consists in a clear statement of the basic facts on which the claim is founded, and not in a mere statement or elaboration of the history of the controversy, or of the precise capacity in which the plaintiff sues.

The federal decisions are full of instances in which the courts of the United States, acting pursuant to the broad powers and discretion conferred by § 954, have refused to permit a party to defeat a just claim by taking advantage of a mere error in pleading by the other side, not affecting the substantial rights of the parties and not discovered until after the limitation period had expired. *McDonald* v. *Nebraska,* 101 Fed. 171; *Willitts & Patterson* v. *Texas Refining Co.,* 2 F. (2d) 547; *Middlesex Banking Co.* v. *Smith,* 83 Fed. 133; *Dittgen* v. *Racine Paper Co.,* 164 Fed. 85, 171 Fed. 631; *Johnson & Co.* v. *Staenglen & Muller,* 85 Fed. 603; *Patillo* v. *Allen West Co.,* 131 Fed. 680; *Quaker City Cab Co.* v. *Fixter,* 4 F. (2d) 327; *Van Doren* v. *Penna. R. R.,* 93 Fed. 260; *Railroad* v. *Horst,* 93 U. S. 291.

Mr. Hobart P. Young for respondents.

What the plaintiff corporation took over from the partnership was a cause of action which then existed in favor of the partnership and against the defendants for damages for breach of contract during the months of November and December, 1916. What happened in March, 1917, was merely that the corporation notified the defendants that it had terminated the contract because of the poor performance in the matter of deliveries. The present cause of action did not accrue to the plaintiff corporation.

If the plaintiff acquiesced in the failure to make deliveries until March 20, 1917, then only such damages as accrued subsequent to that date and until the end of

the term of the contract, which was June 30, 1917, could be recovered. If no claim accrued until March 20, 1917, then no claim existed which N. & G. Taylor Co., the co-partnership, could have assigned to the corporation on February 1, 1917.

Under the Illinois decisions, the plaintiff stated a new cause of action in the amendment. *Allis-Chalmers Mfg. Co.* v. *Chicago,* 297 Ill. 444; *Gallagher* v. *Schmidt,* 313 Ill. 40. The Illinois decisions are not mere inferences from § 18 of the Practice Act.

There was no attempt, not even a defective attempt, to state a cause of action under the statute. Had the plaintiff's declaration stated that it was the actual, *bona fide,* owner of the chose in action, but had omitted to state how and when it obtained title, there would have been a defective statement, fatal under the Illinois decisions; but assuming that, under the federal decisions, it would be held that this could be cured by amendment without being barred by the statute of limitations, yet such a holding would not help the plaintiff in error here, because that question is not in this case.

The decisions of the supreme court of a State construing its practice acts are binding on the federal courts. *Atlantic & P. R. Co.,* v. *Hopkins,* 94 U. S. 11; *Elmendorf* v. *Taylor,* 10 Wheat. 153; *Memphis St. Ry.* v. *Moore,* 243 U. S. 299; *Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100; *Chicago* v. *Obermayer Co.,* 268 Fed. 237; *Nederland Ins. Co.* v. *Hall,* 84 Fed., 278; *Great Sou. Ins. Co.* v. *Burwell,* 12 F. (2d) 244, certiorari denied, 271 U. S. 689; *Jones* v. *Prairie Oil Co.,* 273 U. S. 195; *Irving Nat. Bank* v. *Law,* 9 F. (2d) 536, 10 F. (2d) 721.

The contract as far as it was unexecuted was not assignable.

Mr. Justice Butler delivered the opinion of the Court.

N. & G. Taylor Company, a partnership composed of Taylor and Justice, had long been engaged in the manu-

facture of tin plate. November 1, 1916, respondents and that partnership entered into a contract by which the former agreed to furnish, in fairly equal monthly quantities, and the latter agreed to take and pay for the fuel oil required by it, estimated at 1,200,000 gallons, for the eight months ending June 30, 1917. On January 31, 1917, the partners caused petitioner to be organized, giving it the name of the partnership with the word "Incorporated" added. As of February 1, 1917, the corporation assumed the liabilities of the partnership and took over all its property and has since carried on the business.

The petitioner commenced this action in the northern district of Illinois, eastern division, March 7, 1918. The declaration alleged an agreement between respondents and petitioner for the delivery of the oil, a breach by respondents, and resulting damage. No reference was made to the partnership, the contract between it and respondents, the subsequent creation of petitioner or its acquisition of the business. At the trial in May, 1924, petitioner by leave of court filed an amended declaration alleging that respondents and the partnership made an agreement for the oil in question; that on February 1, 1917, petitioner became the owner of all the assets of the firm including the agreement and all rights appertaining to it; that respondents failed and refused to deliver the oil either prior to February 1, 1917, to the partnership or afterwards to the petitioner—except approximately 40,000 gallons which was delivered to the partnership—and that thereby petitioner itself and as successor of the firm was subjected to great loss. Section 18 of the Illinois Practice Act (c. 110, Cahill's Revised Statutes, 1927) provides that the assignee of any chose in action not negotiable may sue thereon in his own name, "and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how

and when he acquired title . . ." In order to comply with that provision, the petitioner filed the affidavit of its president stating that, on February 1, 1917, it took over the partnership assets including the contract and a right of action against respondents for its breach from the time it went into force to January 31, 1917.

Respondents, by plea to the amended declaration, set up a statute of Illinois (Revised Statutes, c. 83, § 20) declaring that, when a cause of action has arisen in another State "and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State," and one of Pennsylvania (§ 13,857 Pennsylvania Statutes) providing that actions on contracts must be commenced within six years from the time the right of action accrued; and alleged that the cause of action arose in Pennsylvania more than six years before the filing of the amended declaration and was barred by the laws of both States. The trial court held that the amended declaration stated a new cause of action and that it was barred, directed a verdict and gave judgment for the respondents. The Circuit Court of Appeals affirmed. 14 F. (2d) 353. This Court granted a writ of certiorari. 273 U. S. 681.

Section 18 of the Illinois Practice Act will be applied in the courts of the United States sitting in that State. R. S. § 914. *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 488. In the absence of such a provision an assignee of a non-negotiable chose in action could not sue in his own name. *Glenn* v. *Marbury*, 145 U. S. 499, 509. The advantage conferred is taken subject to the terms specified, and the assignee must make the required showing in respect of ownership and source of title. It is established by the decisions of the Supreme Court of Illinois that in an action under that section a declaration that does not state that plaintiff is the actual bona fide owner thereof

and set forth how and when he acquired title fails to state a cause of action. And it is also held that a cause of action set forth in a declaration amended to comply with that section is barred if the period fixed by the statute of limitations has expired when the amended pleading is filed. Applying the state law, it must be held that the amended declaration set up a new cause of action which was then barred. *Gallagher* v. *Schmidt*, 313 Ill. 40; *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444.

Petitioner invokes R. S. § 954 providing that any court of the United States may at any time permit either of the parties to amend any defect in the pleadings upon such conditions as it shall in its discretion and by its rules prescribe. And it contends that federal courts allow such amendments independently of state enactments and decisions, and that here the amended declaration complied with § 18 of the Illinois Act, but stated no new cause of action.

Section 954 governs amendments and is to be liberally construed. *Norton* v. *Larney*, 266 U. S. 511, 516, and cases cited. But the propriety of the filing of the amended declaration is not involved as permission was granted on the application of the petitioner. The substance of the change is to be regarded. In any view, a new cause of action was brought in more than six years after it accrued. The original declaration alleged an agreement between respondents and petitioner and set it out in *haec verba*. It was a letter dated November 1, 1916, addressed to "N. & G. Taylor Company" and signed by respondents. The words "Accepted: N. & G. Taylor Co." appeared at the end of the letter. That declaration did not attempt to state a cause of action under § 18 of the state Practice Act. Petitioner did not sue or claim as assignee. No reference was made to the contract between respondents and the partnership. The cause of action

there stated never existed. The amended declaration states a cause of action for breach of the contract that was made by the partnership. It cannot be treated as curing a defective statement of a cause of action theretofore attempted to be set up. Cf. *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214, 222. The change was not merely one of form; the fundamental substance of the claim was different. Cf. *Friederichsen* v. *Renard,* 247 U. S. 207, 213. It is clear that the amended declaration substituted a new cause of action. Petitioner cites and relies on *Mo., Kans. & Tex. Ry.* v. *Wulf,* 226 U. S. 570. But that case does not support its contention. There the amendment, allowed after the expiration of the period prescribed by the statute of limitations, related to form and not to the substance of the cause of action. The court said (p. 576): "It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit."

And it is plain that six years had expired when the amended declaration was filed. Respondents were in default when petitioner took over the business, February 1, 1917. That appears from the allegations of the amended declaration as well as from the supporting affidavit. The contract covered fuel oil required in a period ending June 30, 1917. The action was commenced March 7, 1918; the cause of action had then accrued. The amended declaration was filed May 14, 1924, more than six years after the action was commenced. It cannot be deemed to relate back as it brought in a new cause of action, which must be treated as commenced at the time the amended declaration was filed. *Union Pacific Railway* v. *Wyler,* 158 U. S. 285, 296, *et seq.; Salyers* v. *United States,* 257 Fed. 255, 259.

Judgment affirmed.

AETNA INSURANCE COMPANY *v.* HYDE.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 112. Argued December 2, 1927.—Decided January 3, 1928.

Rates of all the stock fire insurance companies doing business in Missouri having been reduced uniformly upon consideration *en masse* of their earnings and a finding of an excessive aggregate profit, as provided in § 6283, Rev. Stats. Mo. 1919, they sued jointly in the state courts to obtain judicial review of that determination upon the ground that the aggregate profits were not excessive and that the aggregate collections permitted under the reduced rates were so low as to be confiscatory in violation of the due process clause of the Fourteenth Amendment. But they did not challenge the constitutionality of the statute if construed, as they contended it should be, to require the superintendent to make his determination on the basis of premiums earned and losses and expenses incurred, and not on the basis of premiums received and losses and expenses paid.

Held:

1. Rates fixed by state authority on the basis of aggregate collections of competing fire insurance companies doing business in the State and which afford just compensation to some of them but not to others, cannot be attacked by the former under the Fourteenth Amendment upon the ground that they are confiscatory as applied to the latter; nor may the latter prevent their enforcement against the former because of their inability to compete successfully if their own rates were increased. P. 446.

2. State-made rates do not violate the Fourteenth Amendment merely because aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. P. 447.

3. Rates will be set aside as confiscatory only in clear cases; and the burden is on the one seeking that relief to bring forward the invalidating facts. P. 447.

4. The facts relied on to restrain enforcement of such rates should be specifically set forth, and from them it should clearly appear that the rates would deny to plaintiff just compensation and deprive it of its property without due process of law. P. 447.

5. The complaint does not allege facts to show that the rates were confiscatory as to any company; and it fails to show any

joint interest or right in or to the business covered by the rates or the protection sought to be invoked, or that the Missouri business of each of the companies is so well and economically carried on that all are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies on all the business carried on; it does not state a federal question. P. 448.

6. *Quare,* Whether upon any state of facts, petitioners would be entitled jointly to the constitutional protection invoked. P. 448.

Writ to review 315 Mo. 113, dismissed.

CERTIORARI, 273 U. S. 681, to a decree of the Supreme Court of Missouri, which reversed a decree setting aside an order reducing the rates of the plaintiff fire insurance companies.

Mr. Charles Evans Hughes, with whom *Messrs. Robert J. Folonie, Wm. S. Hogsett, Ashley Cockrill* and *John S. Leahy* were on the brief, for petitioners.

Messrs. John T. Barker and *Floyd E. Jacobs,* with whom *Mr. North T. Gentry* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

October 9, 1922, respondent, acting under § 6283, Revised Statutes of Missouri, 1919, made findings of fact and an order directing a reduction of ten per cent. in the rates charged by stock companies for fire, lightning, hail and windstorm insurance. The petitioners, 156 companies, were all the stock fire insurance companies engaged in that business in Missouri. November 10, 1922, they brought this suit under § 6284 praying that the order be reviewed and set aside. The complaint challenges the methods employed by respondent to make the calculations provided for and alleges that the findings and order are unreasonable, confiscatory, and in contravention of the due process clause of the Fourteenth Amendment. Issue was joined

and a trial was had. The circuit court, confirming the report of a referee appointed to hear the evidence and report his findings of fact and conclusions of law, found the order unreasonable and confiscatory and entered a decree setting it aside. The Supreme Court reversed and dismissed the case. 315 Mo. 113. This court granted a writ of certiorari. 273 U. S. 681.

Respondent insists that the case presents no federal question. In order to determine whether that contention has merit, it is necessary to examine the statutory provisions under which the respondent made the findings and order complained of, the grounds on which petitioners seek to have them set aside, and the decision of the Supreme Court.

Section 6283, as it was at the time the order was made,[1] provided that the superintendent of insurance "is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. . . ."

Section 6284, as it stood when this suit was commenced, provided: "The orders and directions of the superintendent of insurance, together with his findings or determinations of facts upon which such order or determination is founded, shall be reviewable by a proper action in the courts, and upon such review the entire matter shall be treated and determined *de novo*. . . ." This section was amended before the trial. Laws of 1923, p. 235. The

[1] This section has since been amended. Laws 1923, p. 235.

following was added: "The court shall have authority to sustain, set aside or modify the orders and directions under review."

The complaint alleges that the rates were not excessive before the reduction; that each company has local agency plants in Missouri ranging in value from $10,000 in case of small companies having but few agencies to $50,000 for larger companies having many, and that the good will of the agencies of each is of great value; that in Missouri normal expenses of each are from 35 to 45 per cent. of earned premiums and the yearly aggregate of all expenses is approximately 42 per cent. of all earned premiums, but that in the five year period ending with 1921 total expenses amounted to about 44 per cent. of all premiums earned for insurance written in that period; that, in accordance with Missouri law, each company maintains a sum equal to its unearned premiums; that each should also have a surplus over its capital stock of three per cent. of its premiums on fire insurance policies in each year to meet the hazards of conflagration [2] and of ten per cent. of other premiums against the risk of other catastrophes; and that each company is entitled to earn annually an underwriting profit of at least five per cent. of the earned premiums; that such profit for any period is the amount of premiums earned less losses and expenses incurred; that in the five year period ending with 1921 the combined experience of all companies on all classes of insurance in Missouri was: losses incurred, 64.9 per cent. of earned premiums, expenses incurred, 44.4 per cent., making a total of 109.3 per cent., without any allowance for a fund to meet conflagration and catastrophe hazards or for profits to the companies.

[2] The referee reported that a conflagration is any loss in excess of $1,000,000, and that it is customary to charge that amount of the loss against the State in which it occurs, and prorate the remainder among all the States.

And the complaint shows that prior to the order here in question and on January 5, 1922, the superintendent made an order reducing rates 15 per cent. The companies sued him to enjoin its enforcement. The parties entered into a stipulation reciting that he had revoked the order and agreeing that the case be dismissed. And it was stated therein that the superintendent, not earlier than March 15, 1922, might call a hearing to investigate the necessity for a reduction of rates; that at such hearing the experience of the companies in Missouri for 1921 should be offered in evidence and considered by the superintendent, together with such other evidence as might be offered; that at the conclusion of the hearings the superintendent would make certain findings of fact and announce his determination. And the stipulation contained the following: "That if . . an order reducing the rates . . be made . . the said insurance companies, if dissatisfied . . will proceed to secure a review thereof by the trial de novo in the Circuit court of Cole County, Missouri. . . . That in such matter the question of the constitutionality of §§ 6283 and 6284 . . . shall not be raised, nor shall the legality of the hearing above provided for be questioned."

And the complaint alleges that there was a hearing at which the companies performed their part of the agreement, but that the superintendent failed to make the findings specified in the stipulation. The order (set forth in the bill) stated that the companies refused to supply necessary data to enable the superintendent to make such findings, and that his investigation was based on sworn reports filed by the companies during the five-year period. The findings contained in the order are that, in respect of the business in Missouri, the companies in that period collected net premiums amounting to $81,067,318, interest on capital and surplus prorated to that State $2,801,660

and interest on unearned premium reserves $2,418,596 making a total of $86,287,574; that they paid losses of $45,066,124; that expenses amounted to $32,534,617 leaving $8,686,833 profits, and that expenses were excessive by not less than $5,000,000. The order declared that the rates then in force produced excessive and unreasonable profits and that a reduction of ten per cent. in the existing rates would result in profits that are reasonable. And it directed that rates so reduced take effect November 15, 1922.

The complaint avers that if § 6283 be construed to authorize the superintendent of insurance to take into account interest on earnings, capital stock, surplus and unearned premium reserves or to make his determination of profit or loss on the basis of premiums received and losses and expenses paid—as distinguished from premiums earned and losses and expenses incurred,—or if it be held to authorize the superintendent to regulate the expenses of the companies or the inspection of their risks or the amount of insurance they may write, then the section would violate the due process clause of the Fourteenth Amendment. And it charges that the methods and calculations employed and the findings of fact made by the superintendent are erroneous, unreasonable and unjust; that the prescribed rates are unreasonable, inadequate and confiscatory, and that the enforcement of the order would operate to deprive the petitioners and each of them of their property without due process of law.

By his answer, the superintendent denies the allegations of fact and challenges the grounds on which petitioners contend that the findings and order are repugnant to the Fourteenth Amendment.

The Supreme Court considered the evidence and held that the order reducing rates was justified. It did not pass upon petitioners' contentions that their rights safe-

guarded by the Fourteenth Amendment had been or would be infringed by the state law or by the superintendent's findings and order.

It will be observed that here the controversy concerns the basis on which the findings were to be made, and that petitioners do not challenge the constitutionality of the statute if construed, as they contend it should be, to require the superintendent to make his determinations on the basis of premiums earned and losses and expenses incurred. Unlike the general power to prescribe insurance premiums conferred by the Kansas statute upheld in *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, the Missouri statute before us narrowly limits the authority of the superintendent of insurance. He is not authorized to determine whether, when applied to the Missouri business of the several companies or of any of them, the existing or prescribed rates had been or would be just and reasonable. Section 6283 requires consideration *en masse* of the "result of the earnings" of all the companies, and, upon finding an excessive "aggregate profit," it becomes the duty of the superintendent to limit the "aggregate collections" to not more than a reasonable profit. The reduced rates are applicable to the business of all companies alike and without regard to the amount of the past or prospective profits or losses of any of them. And the attack is by joint action of all the companies. It is not claimed by or on behalf of any company that, when applied to its business, the reduced rates are or would be too low to permit the company to make a reasonable profit or to have just compensation for its contracts of insurance.

No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. *Supervisors* v. *Stanley*, 105

U. S. 305, 311; *Heald* v. *District of Columbia,* 259 U. S. 114, 123. As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others. But the latter have no constitutional right to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, "aggregate collections" sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.

The complaint was framed to secure judicial review (§ 6284) of the determination of the respondent. The ground of attack was that the aggregate profits were not excessive and that the aggregate collections permitted under the reduced rates were too low. Allegations asserting in general language that the findings, order and reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient. In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law. *Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 314; *Atlantic Coast Line* v. *Florida,* 203 U. S. 256. Jurisdiction of this Court to set aside state-made rates as confiscatory will be exercised only in clear cases. And the burden is on one

seeking that relief to bring forward and satisfactorily prove the invalidating facts. *Chicago, &c. Ry. Co.* v. *Wellman,* 143 U. S. 339, 344–345; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 441, 446; *Knoxville* v. *Water Co.,* 212 U. S. 1, 8, 16; *The Minnesota Rate Cases,* 230 U. S. 352, 433, 452; *Brush Elec. Co.* v. *Galveston,* 262 U. S. 443, 446. Neither of the sections authorized a determination of the reasonableness of rates when applied to the business of any company. The complaint did not allege any facts to show that the reduced rates were confiscatory as to any company. The court was not called upon to determine whether the order would operate to deprive any company of its property without due process of law. It treated the suit as one to obtain the review provided for by § 6284.

The petitioners are competitors and each carries on business for itself. While they may by joint action pursue the remedy given by § 6284, it does not follow that the Constitution safeguards aggregate profits sufficient to constitute just compensation for all the companies. The complaint fails to show any joint interest or right in or to the business covered by the rates or the protection sought to be invoked. And it fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies. Assuming that, upon any state of facts, the petitioners would be entitled jointly to have such protection, and as to that no opinion is expressed, it is enough to say that the facts brought forward in this case are not sufficient to raise the question whether the state law or the superintendent's finding of facts or his order is repugnant to the due process clause of the Fourteenth Amendment. No federal question is presented.

Writ dismissed.

ROCHE *v.* McDONALD.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 38. Submitted October 14, 1927.—Decided January 3, 1928.

1. A writ of error will not lie under Jud. Code, § 237 (a), to review the judgment of a state court upon the ground that it failed to give full faith and credit, as required by Art. IV, § 1, of the Constitution, to the judgment of a court of another State, but the papers may be treated as an application for certiorari, and that writ may be issued thereon. P. 450.
2. The Full Faith and Credit Clause requires that the judgment of a state court which had jurisdiction of the parties and the subject-matter, shall be given in the courts of every other State the same credit, validity and effect as it has in the State where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that State can be relied on in the courts of any other State. P. 451.
3. R. recovered a judgment by default against M in an action on a Washington judgment in an Oregon Court in which M, after being personally served while temporarily in Oregon, had appeared and demurred to the complaint but had elected not to plead further when the demurrer was overruled. In a subsequent action on the Oregon judgment in Washington, the Washington court refused to enforce it, upon the ground that the original Washington judgment had expired and become a nullity by lapse of time under the statutes of that State, before the Oregon judgment was rendered, so that the latter was without legal foundation, and, as it would have been void if rendered under like circumstances in a court of Washington, could be given no force or effect when sued upon in Washington. *Held*, error, since the Oregon judgment, even though erroneous, was valid and conclusive between the parties in Oregon, and under the Full Faith and Credit Clause, was equally conclusive in Washington.

136 Wash. 322, reversed.

Certiorari to a judgment of the Supreme Court of Washington, denying relief in an action on an Oregon judgment. The writ of error is dismissed and certiorari granted.

Messrs. Beverly C. Mosby and *Lucius G. Nash* were on the brief for petitioner.

Mr. W. G. Graves was on the brief for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This writ of error is brought to review a judgment of the Supreme Court of the State of Washington which is challenged on the ground that the full faith and credit prescribed by § 1 of Art. IV of the Constitution was not given to a judgment of a court of the State of Oregon on which the plaintiff in error relied. As this does not present a ground for the writ of error under § 237 (a) of the Judicial Code, as amended by the Jurisdictional Act of 1925,[1] this writ is dismissed for want of jurisdiction. But since the papers show adequate reason for invoking a review by a petition for certiorari, that writ is granted,[2] and we proceed to the consideration of the case on the merits.

The parties to this suit have been for many years residents of Washington. On June 24, 1918, one Dart recovered a judgment for $12,500 against McDonald in a superior court of Washington. In February, 1924, Dart assigned this judgment to Roche. In March, McDonald being then temporarily employed in Oregon, Roche brought suit against him upon this judgment in a circuit court of that State. He was personally served with a summons, appeared and demurred to the complaint. This demurrer was overruled. He then elected to plead no further and did not answer the complaint. Subsequently, in October, 1924—more than six years after the rendition of the Washington judgment—judgment was rendered

[1] 43 Stat. 936, c. 229; printed as an Appendix to the Revised Rules of this Court, 266 U. S. 687.

[2] Sec. 237(c) of the Judicial Code, as amended.

against him in default of answer for the amount of the original judgment, with interest.

Shortly thereafter, Roche brought this suit against McDonald, upon the Oregon judgment, in the superior court of Washington. McDonald answered, denying the validity of the Oregon judgment under a Washington statute which provided that after six years from the rendition of any judgment it should cease to be a charge against the judgment debtor, and no suit should be had extending its duration or continuing it in force beyond such six years.[3] Roche replied, setting up and relying upon the full faith and credit clause of the Constitution.

The superior court entered judgment for McDonald. This was affirmed by the Supreme Court of Washington, which held that under the Washington statute the original judgment expired at the end of six years from its rendition and could not be extended by another suit; that having been rendered when the original judgment had become a nullity, the Oregon judgment had no legal foundation, and, as it would have been void and of no effect if rendered under like circumstances by a court of Washington, could be given no force or effect when sued upon in Washington; and that under the full faith and credit clause the courts of Washington "are not bound to give full faith and credit to the Oregon judgment according to its literal terms, but are privileged and have the duty to view that judgment in the light of the foundation upon which it rests and the judgment law of our own state." 136 Wash. 322.

It is settled by repeated decisions of this Court that the full faith and credit clause of the Constitution requires that the judgment of a State court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was

[3] Laws of 1897, c. 29; Remington's Compiled Statutes, §§ 459–460.

rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that State can be relied on in the courts of any other State. *Mills* v. *Duryee,* 7 Cranch 481, 484; *Hampton* v. *McConnel,* 3 Wheat. 234, 235; *D'Arcy* v. *Ketchum,* 11 How. 165, 175; *Cheever* v. *Wilson,* 9 Wall. 108, 123; *Hancock National Bank* v. *Farnum,* 176 U. S. 640, 643; *Tilt* v. *Kelsey,* 207 U. S. 43, 57; *Converse* v. *Hamilton,* 224 U. S. 243, 259. This rule is applicable where a judgment in one State is based upon a cause of action which arose in the State in which it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, must be enforced in such other State although repugnant to its own statutes. *Christmas* v. *Russell,* 5 Wall. 290, 302; *Fauntleroy* v. *Lum,* 210 U. S. 230, 236; *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 415.

In *Christmas* v. *Russell, supra,* the defendant, a resident of Mississippi, executed there a promissory note, which was endorsed by the payee to the plaintiff, a resident of Kentucky. After action on this note had been barred by the Mississippi statute of limitation, the defendant having come into Kentucky on a visit, was there sued on the note. His defense on the statute of limitations of Mississippi was overruled, and judgment was entered for the plaintiff. The plaintiff then brought suit upon this Kentucky judgment in the Federal circuit court of Mississippi, where the defendant made defense under another statute of Mississippi, which provided that no action should be maintained on any judgment rendered against a resident of the State by any court without the State where the cause of action would have been barred by limitation if the suit had been brought within the State. The defense was overruled, and judgment entered for the plaintiff. This was affirmed here on the ground that under the full faith and credit clause this Mississippi statute was unconstitutional and void as affecting the right of the plaintiff to enforce the

Kentucky judgment; the Court saying that since that judgment was valid in Kentucky and conclusive between the parties there, it was not competent for any other State to authorize its courts to open the merits and review the cause, or to enact that such a judgment should not receive the same faith and credit that by law it had in the courts of the State from which it was taken.

In *Fauntleroy* v. *Lum, supra,* the original cause of action arose in Mississippi out of a gambling contract in cotton futures. The laws of Mississippi made dealing in futures a misdemeanor, and provided that such contracts should "not be enforced by any court." The controversy had been submitted to arbitration, and an award made against the defendant. Thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award. The court refused to allow the defendant to show the nature of the transaction and its illegality under the laws of Mississippi, and entered judgment for the plaintiff. Suit was then brought upon this Missouri judgment in a court of Mississippi. Judgment was entered for the defendant which was affirmed by the Supreme Court of Mississippi. This Court, in reversing that judgment, said: "The doctrine laid down by Chief Justice Marshall was 'that the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States.' *Hampton* v. *McConnel,* 3 Wheat. 234. . . . Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. . . . A judgment is conclusive as to all the *media concludendi, United States* v. *California*

& Oregon Land Co., 192 U. S. 355; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law. Of course a want of jurisdiction over either the person or the subject-matter might be shown. *Andrews* v. *Andrews*, 188 U. S. 14; *Clarke* v. *Clarke*, 178 U. S. 186. But as the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law." This case was cited and followed in *American Express Company* v. *Mullins*, 212 U. S. 311, 314, holding that under the full faith and credit clause a judgment in one State was conclusive as to all the *media concludendi*, and could not be impeached in another State by showing that it was based upon a mistake of law.

In *Kenney* v. *Supreme Lodge*, 252 U. S. 411, a suit was brought in Illinois upon an Alabama judgment based upon a cause of action which under an Illinois statute could not be brought or prosecuted in that State. This Court, in holding that the Illinois statute was repugnant to the full faith and credit clause, said: "In *Fauntleroy* v. *Lum*, 210 U. S. 230, it was held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See *Christmas* v. *Russell*, 5 Wall. 290; *Converse* v. *Hamilton*, 224 U. S. 243."

The *Fauntleroy* case is directly controlling here. The court of Oregon had jurisdiction of the parties and of the subject-matter of the suit. Its judgment was valid and conclusive in that State. The objection made to enforce-

ment of that judgment in Washington is, in substance, that it must there be denied validity because it contravenes the Washington statute and would have been void if rendered in a court of Washington; that is, in effect, that it was based upon an error of law. It cannot be impeached upon that ground. If McDonald desired to rely upon the Washington statute as a protection from any judgment that would extend the force of the Washington judgment beyond six years from its rendition, he should have set up that statute in the court of Oregon and submitted to that court the question of its construction and effect. And even if this had been done, he could not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive between the parties in that State, was equally conclusive in the courts of Washington, and under the full faith and credit clause should have been enforced by them.

The judgment of the Supreme Court of Washington is reversed; and the case remanded for further proceedings not inconsistent with this opinion.

Writ of error dismissed; certiorari granted; reversed.

GULF, MOBILE AND NORTHERN RAILROAD COMPANY v. WELLS.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 39. Argued October 18, 1927.—Decided January 3, 1928.

1. A judgment for damages cannot stand in an action under the Federal Employers' Liability Act if, under the applicable principles of law as interpreted by the federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence alleged was the cause of the injury. P. 457.
2. A brakeman, in seeking to board the caboose of a local freight train moving at ten miles per hour, ran to it from where he had

thrown a switch, and as he caught a grabiron, turned his foot on a piece of coal, went down, was thrown loose from the train, fell to the ground and was injured. *Held*, that his testimony to the effect that the loss of his hold was due to an unusual jerk given by the engine, more severe than any he had experienced or seen on a local freight train, could not sustain an inference of negligence upon the part of the engineer, (1) because there was no evidence that the engineer knew or should have known that he was not on the train, but was attempting to get on it after it had started and was in a situation in which a jerk of the train would be dangerous to him; (2) because, in view of the brakeman's position, at the side of the caboose, ten car-lengths from the engine, his statement that the jerk was given by the engine was mere conjecture; (3) because, considering his situation at the time, his opinion that the jerk was unusual was without substantial weight. P. 458.

Reversed.

CERTIORARI, 271 U. S. 654, to a judgment of the Supreme Court of Mississippi, sustaining a judgment for personal injuries in an action under the Federal Employers' Liability Act.

Mr. Ellis B. Cooper for petitioner.

Mr. W. Calvin Wells for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought by Wells in a circuit court of Mississippi to recover damages for injuries suffered by him while employed as a brakeman on a freight train of the Railroad Company. The declaration alleged that these injuries were caused by the negligence of the engineer in giving a very sudden and unnecessary jerk to the train when it was moving and Wells was undertaking to get on it, which threw him on the ground. At the conclusion of the evidence the Railroad Company requested that the jury be instructed to find for the defendant. This was refused. The jury found for the plaintiff; and the

judgment entered on the verdict was affirmed by the Supreme Court of the State, without opinion.

It is unquestioned that Wells was at the time employed in interstate commerce, and that the case is controlled by the Federal Employers' Liability Act.[1] Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient, in kind or amount, to warrant a finding that the negligence of the engineer was the cause of the injury, the judgment must be reversed. *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Chicago, M. & St. P. Railway* v. *Coogan*, 271 U. S. 472, 474.

Wells, who had been employed as an extra brakeman for a few months, was on the day of the injury the rear brakeman on a local freight train containing ten cars. After stopping at a station where some switching was done, the train was coupled up on the main track, on a down grade, in readiness to proceed on its journey. The engineer, fireman and head brakeman were in the cab of the engine. The engineer was on the right side, and the fireman on the left, it being his duty to take signals from that side and pass them to the engineer. The conductor and flagman were in the caboose at the rear of the train, and Wells was standing on the left of the train, near the caboose. Wells gave a signal to the fireman for the train to go ahead; and the fireman then went down into the deck of the engine to shovel in coal. Just after this signal was given Wells was told by the conductor to throw a derail switch on the left of the main track, some fifty feet from the caboose. After doing this, finding that the train had already started, he ran back. When he reached the train it had gone about fifty feet and was moving from eight to ten miles an hour. The cars had then passed him and he started to get on the caboose. He testified

[1] 35 Stat. 65, c. 149.

that as he caught the grab iron he stepped on a big piece of coal, his foot turned and he "went down and the engine gave an unusual jerk" which threw him loose from the train, and he fell on the ground, his knee striking on the cross ties, breaking the kneecap and otherwise injuring him. He also testified, on cross examination, that while the running in of slack on freight trains jerks or lurches them to a certain extent, this was a severe jerk such as he had never experienced before on a train; and, finally, that although he had seen such jerks on through freight trains, he had never seen them in local freights. The plaintiff offered no other evidence as to the cause of the injury.

All the other members of the train crew were introduced as witnesses by the defendant. Their testimony was to the effect that it was not the duty of the engineer before starting to look out for the men who might be on the other side of the train, that being the duty of the fireman; that when the engineer pulled out he did not know where Wells was; that he started in the ordinary way, with open throttle, and did nothing in operating the engine that could cause a sudden or unusual lurch of the train; that after a freight train starts there are usually jerks or lurches caused by the running out of the slack between the cars; that after the slack runs out the engineer cannot give any jerk or lurch to the train even by suddenly putting on steam; and that at the time of the injury there was in fact no unusual jerk or lurch of the train. No rebuttal evidence was offered.

It is urged here in behalf of Wells that, despite this evidence, the question of the engineer's negligence was properly submitted to the jury because of an inference to be drawn from Wells' own statement that "the engine gave an unusual jerk" which was more severe than any he had ever experienced or seen on a local freight train. We cannot sustain this contention. In the first place, there

was no evidence that the engineer knew or should have known that Wells was not on the train, but was attempting to get on it after it had started and was in a situation in which a jerk of the train would be dangerous to him. See *Texas & Pacific Railway* v. *Behymer,* 189 U. S. 468, 470. Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had turned on the piece of coal and he had gone "down," being plainly one in which he could not compare with any accuracy the jerk which he then felt with those he had experienced when riding on freight trains.

In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough. *Patton* v. *Texas & Pacific Railway,* 179 U. S. 658, 663; *Chicago, M. & St. P. Railway* v. *Coogan,* 271 U. S. 478.

As the jury should have been instructed to find for the defendant, we have no occasion to consider other questions which have been argued in reference to the charge to the jury.

The judgment is reversed, and the cause remanded to the Supreme Court of Mississippi for further proceedings not inconsistent with this opinion.

Reversed.

MELLON, DIRECTOR GENERAL, *v.* ARKANSAS LAND & LUMBER CO.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 73. Argued October 27, 1927.—Decided January 3, 1928.

Under § 206 of the Transportation Act, 1920, which provided that actions at law based on causes of action arising out of the operation by the President of the railroad of any carrier, might, after the termination of federal control, be brought against "an agent designated by the President for such purpose . . . within the periods of limitation now prescribed by State or Federal statutes," an action was mistakenly brought against one who had resigned from the position of designated agent. *Held*, that the substitution of his successor was in effect the commencement of a new and independent proceeding, which was barred by the running of the applicable state statute of limitations before the substitution was made. P. 462.

155 Ark. 541; 170 *Id.* 552, reversed.

CERTIORARI, 273 U. S. 676, to a judgment of the Supreme Court of Arkansas, sustaining a recovery in an action brought by the Land and Lumber Company under the Transportation Act.

Mr. J. Q. Mahaffey for petitioner.

Mr. E. F. McFaddin for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The question in this case relates to the construction and effect of the provision in § 206 of the Transportation Act, 1920,[1] which permitted suits on causes of action that had arisen during the Federal control of railroads to be brought thereafter against an Agent designated by the President. This section, in so far as here material, pro-

[1] 41 Stat. 456, c. 91.

vided that actions at law based on causes of action arising out of the operation by the President of the railroad of any carrier, might, after the termination of Federal control, be brought against "an agent designated by the President for such purpose . . within the periods of limitation now prescribed by State or Federal statutes"; and that a judgment "rendered against the agent designated by the President" should be paid out of a revolving fund created by the Act.

On July 23, 1918, a cause of action accrued in favor of the Arkansas Land & Lumber Company on account of the misdelivery of a carload of lumber shipped by it over the railroads of two carriers then being operated under Federal control. The Arkansas statute of limitations provided that suit "shall be commenced within three years after the cause of action shall accrue, and not after." [2]

No suit was brought during the period of Federal control, which terminated on March 1, 1920.[3] Thereafter, on July 9, 1921—nearly three years after the cause of action accrued—the Company brought suit in an Arkansas circuit court against "John Barton Payne, Director General, as Agent for" the railroad carriers, alleging that he then was "the agent duly designated by the President" against whom suits might be brought.[4] At that time Payne was not the Agent designated by the President, having resigned as Director General and designated Agent more than three months before; and James C. Davis had been designated by the President and then was the Agent.[5]

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[2] Crawford & Moses Digest of the Statutes of Arkansas (1921), § 6950.

[3] Transportation Act, § 200 (a).

[4] The railroad carriers were also made defendants, but on their demurrers the suit was dismissed as to them. *Missouri Pacific Railroad* v. *Ault*, 256 U. S. 554; *Davis* v. *Cohen Co.*, 268 U. S. 638; *Mellon* v. *Weiss*, 270 U. S. 565.

[5] Proclamation, 42 Stat. 2237.

In October, 1921—more than three years after the cause of action accrued—on a plea in abatement by Payne to the effect that he was not the designated Agent, the court dismissed the suit as to him; and, on motion of the plaintiff, Davis, the designated Agent, was substituted as the defendant. Davis, thereafter appearing, pleaded that under § 206 of the Transportation Act the suit could not be prosecuted against him as he had not been made a party within the period of limitation prescribed by the Arkansas statute. The circuit court sustained this plea and dismissed the suit. The Supreme Court reversed the judgment on the ground that the substitution of Davis was not the institution of a new action against him, but merely an amendment correcting the name of the defendant in furtherance of justice; and remanded the cause to the circuit court. 155 Ark. 541. Davis there renewed his plea under the Transportation Act. This was overruled, and judgment was rendered against him. The Supreme Court—in which the petitioner, who meanwhile had succeeded Davis as the designated Agent,[6] was substituted as the appellant—adhered to its former ruling and affirmed the judgment. 170 Ark. 552.

This, we find, was error. The United States had not consented to being sued after the termination of Federal control except as provided by § 206 of the Transportation Act, that is, by a suit brought against the Agent designated by the President for such purpose, within the period of limitation prescribed by the State statute. This plainly meant that the suit must be brought within the period of limitation against the person who was the designated Agent and alone had authority to represent the Government. The bringing of the suit against Payne, who was not the designated Agent, was not a compliance with this requirement and brought no representative of

[6] Proclamation, 44 Stat. 2598.

the Government before the court. *Davidson* v. *Payne* (C. C. A.) 289 Fed. 69. The substitution of Davis, the designated Agent, was not the correction of an error in the name of the defendant, but the bringing in of a different defendant, and was in effect the commencement of a new and independent proceeding against him to enforce the liability of the Government. See *Davis* v. *Cohen Co.*, 268 U. S. 638, 642; *Mellon* v. *Weiss*, 270 U. S. 565, 567. And, as this substitution, being made more than three years after the cause of action had accrued, was not a compliance with the requirement of the Transportation Act that the action be brought against the designated Agent within the period of limitation prescribed by the State statute, the plea should have been sustained and the suit dismissed.

This conclusion is substantially the same as that in *United States* v. *Davis* (D. C. App.) 8 F. (2d) 907; *Vassau* v. *Northern Pacific Railway*, 69 Mont. 305; *Davis* v. *Griffith*, 103 Okla. 137; and *Natoli* v. *Davis*, 75 Cal. App. 309: *contra*, *Bailey* v. *Hines*, 131 Va. 421.

The judgment is reversed, and the cause remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this opinion.

Reversed.

JACKSON ET AL. *v.* S. S. "ARCHIMEDES."

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 103. Argued December 1, 1927.—Decided January 3, 1928.

1. Section 10 of the Dingley Act of 1884, as amended by the Seamen's Act of 1915, and the Merchant Marine Act of 1920, does not apply either expressly or by implication to advance wages paid by foreign vessels to foreign seamen while in ports of foreign countries whose laws sanction such payments. P. 470.

2. When foreign seamen institute a libel in this country against a foreign vessel for wages due them, the master is entitled to deduct the advances made in the foreign country. P. 470.

11 F. (2d) 1000, affirmed.

CERTIORARI, 273 U. S. 679, to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court, dismissing a libel *in rem* brought by British seamen for the purpose of collecting full wages without deduction of advances made in England.

Mr. Silas B. Axtell, with whom *Mr. John W. Davis* was on the brief, for petitioners.

Mr. Roscoe H. Hupper, with whom *Messrs. Van Vechten Veeder* and *William J. Dean* were on the brief, for respondent.

Mr. Howard Thayer Kingsbury, with whom *Mr. Frederic R. Coudert* was on the brief, as *amici curiae* by special leave of court, on behalf of the British Embassy.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case presents the question whether § 10 of the Dingley Act of 1884,[1] as amended by the Seamen's Act of 1915[2] and the Merchant Marine Act of 1920,[3] applies to the payment of advance wages to seamen on a foreign vessel in a foreign port.

The petitioners are British seamen, who shipped at Manchester, England, in May, 1922, on the *Archimedes,* a British vessel, for a round trip voyage to New York and return. When they signed the shipping articles they received advances on account of wages, which were cus-

[1] 23 Stat. 53, c. 121.

[2] 38 Stat. 1164, c. 153.

[3] 41 Stat. 988, c. 250; U. S. C., Tit. 46, c. 24.

tomary and sanctioned by the British law. On June 1, the vessel arrived in New York. On June 3, they applied for and received from the master further payments on account of wages which, with the advances made in England, exceeded one-half of the wages then earned and unpaid. On June 8, while still in port, they made a formal demand upon the master for one-half of the wages then earned and unpaid, disregarding the advances made in England. This having been refused, they left the vessel and filed this libel in the District Court, claiming that under R. S. § 4530[4] they were entitled to the full wages earned at the time of the demand, without deducting the advances made in England, since these advances were invalidated by § 10 of the Dingley Act, as amended, and should be disregarded in computing the amount of wages due. On the hearing the court dismissed the libel on the ground that the Act does not prohibit advances to seamen on foreign vessels in foreign ports, and such advances cannot be treated as invalid and disregarded when wages are demanded in this country. 10 F. (2d) 234. This was affirmed by the Circuit Court of Appeals on the opinion of the District Judge. 11 F. (2d) 1000.

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[4] This section was amended by § 31 of the Merchant Marine Act so as to read as follows: "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master . . . one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel . . . shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided,* Such a demand shall not be made before the expiration of, nor oftener than once in, five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. . . . *And provided further,* That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

To understand rightly the effect of the amendment made by the Merchant Marine Act of 1920—the controlling question in this case—it is necessary to consider first the amendment previously made by the Seamen's Act of 1915 and the decisions by this Court in reference thereto.

By § 11 of the Seamen's Act, Section 10 of the Dingley Act was amended so as to read as follows:

"Sec. 10 (a). That it shall be . . . unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same. . . . Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine . . . and may also be imprisoned. . . . The payment of such advance wages . . . shall in no case except as herein provided absolve the vessel or the master . . . from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. . . .

"(e) That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master . . . of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master . . . of a vessel of the United States would be for similar violation. The master . . . of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with."

It was held by this Court in *Sandberg* v. *McDonald*, 248 U. S. 185, 195 (1918), that § 11 of the Seamen's Act did not render invalid the contracts of foreign seamen as to the advance payment of wages made by a foreign vessel

in a foreign country in which the law sanctioned such contract and payment; and that when they made demand in this country for the payment of half wages, the master was entitled to deduct the advances made in the foreign country. In so holding, the Court said:

"Conceding for the present purpose that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States, it is to be noted, that such sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication. There is nothing to indicate an intention, so far as the language of the statute is concerned, to control such matters otherwise than in the ports of the United States. The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that such advancements shall in no cases, except as in the act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to foreign vessels? We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels 'while in waters of the United States.'

"Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. . . . We think that there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries

would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

"In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master . . . of any such vessel, who violates the provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress. *United States* v. *Freeman*, 239 U. S. 117, 120. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States."

On the same day, in *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205, it was likewise held, upon the same general considerations, that the Seamen's Act of 1915 did not make invalid advances that had been made to seamen by the master of an American vessel in a foreign port.

And later, in *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 355 (1920), in distinguishing § 4 of the Seamen's Act—which in express terms declared that contracts denying seamen the right to demand half of their earned wages at ports reached in the course of a voyage, should be void, and gave seamen on foreign vessels while in American harbors the right to enforce its provisions in the courts of the United States [5]—from § 11 of the Act dealing with advance wages, this Court said: "In the case of *Sandberg* v.

[5] The provisions in § 4 of the Seamen's Act, which had amended R. S. § 4530, were the same in these respects as in the amendment made by the Merchant Marine Act which is set forth in Note 4, *supra*.

McDonald . . . we found no purpose manifested by Congress in § 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in § 4. Under § 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment. . . ."

The libelants concede that under § 11 of the Seamen's Act, as interpreted by this Court in the *Sandberg* case, it would have been necessary to deduct the advances that had been made in England in computing the wages due them when the demand was made in this country, but insist that the law was thereafter changed in this respect by the amendment made by the Merchant Marine Act of 1920.

By § 32 of the Merchant Marine Act, Section 10 of the Dingley Act was further amended so as to make the third sentence of paragraph (a) dealing generally with advance payments, read as follows: "The payment of such advance wages . . . whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master . . . from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages." This amendment made no change in any other part of paragraph (a), or in paragraph (e) referring to foreign vessels, which remained in full force.

The libelants contend that in making this amendment Congress intended to meet the effect of the decisions in both the *Sandberg* and *Neilson* cases, and to extend the

prohibition of advance wages to foreign vessels in foreign ports, as well as to American vessels in foreign ports.

We cannot sustain this contention. That this amendment expressed no intention to extend the provisions of the statute to advance payments made by foreign vessels while in foreign ports, is plain. This Court had pointed out in the *Sandberg* case that such a sweeping provision was not specifically made in the statute, and that had Congress so intended, "a few words would have stated that intention, not leaving such an important regulation to be gathered from implication." The amendment, nevertheless, not only contained no such specific statement, but made no reference whatever to foreign vessels;—left unchanged and in full force all of paragraph (e) which alone referred to foreign vessels, including the specific provision which, as held in the *Sandberg* case, indicated that the prohibition of advance wages was intended to apply to foreign vessels only while in waters of the United States;—made no change in the criminal provisions which strengthened the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States;—and merely inserted the phrase "whether made within or without the United States or territory subject to the jurisdiction thereof" in paragraph (a) which made no reference to foreign vessels. This phrase, read in the light of the context, is given full effect when applied to American vessels; and thus construed is entirely consistent with the provision in paragraph (e) relating to foreign vessels while in American waters. In short, the language of the amendment indicates no intention to extend the prohibition of the statute to advance wages paid by foreign vessels while in foreign ports. Nor can such an intention be "gathered from implication," or from anything in the legislative history of the amendment, in which no reference was made to foreign vessels.

The decree is *Affirmed.*

Counsel for Parties.

INGRAM-DAY LUMBER COMPANY *v.* McLOUTH.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 126. Argued December 6, 7, 1927.—Decided January 3, 1928.

1. Plaintiff contracted to furnish defendant a specified quantity of lumber, knowing that it was to be used by defendant in building boats but not that they were being built under a contract between the defendant and the Fleet Corporation. Afterwards, the Fleet Corporation, acting under Executive Orders and the Act of June 15, 1917, cancelled its contract, notifying defendant to make no further commitments or expenditures, and defendant, without acting or purporting to act under authority of the Corporation, stopped deliveries of lumber by the plaintiff. *Held:*

   (1) That the damages recoverable by the plaintiff from the defendant, were not measured as where "just compensation" is claimed from the United States under the statute for cancellation of the government's own contracts, but included anticipated profits. P. 473.

   (2) Plaintiff's rights under its own contract were not dependent on the continued existence of defendant's contract with the Fleet Corporation. P. 474.

2. Appellate review in this case, where a jury was waived in writing, *held* limited to the sufficiency of the facts specially found to support the judgment and to rulings excepted to and presented by bill of exceptions. P. 474.

13 F. (2d) 581, reversed.

CERTIORARI, 273 U. S. 684, to a judgment of the Circuit Court of Appeals which affirmed a judgment, 6 F. (2d) 471, not including anticipated profits, recovered by the petitioner in an action brought against McLouth and revived against his administrator.

Mr. Wm. J. Shaw, with whom *Messrs. W. A. White, Sidney T. Miller, George L. Canfield*, and *Ferris D. Stone* were on the brief, for petitioner.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell, Mr. Chauncey G. Parker,* General Counsel, U. S. Shipping Board, and *Mr. I. V. McPherson,* Assistant Counsel, U. S. Shipping Board, were on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

Petitioner sued in the district court for eastern Michigan for the decedent's breach of contract to purchase a quantity of lumber. The defense relied on was that the lumber was to be used by the intestate in the performance of contracts he had made with the United States Shipping Board Emergency Fleet Corporation for the construction of a number of ocean-going tugboats; that acting under the President's Executive Orders of July 11, 1917, and December 3, 1918, and the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, 40 Stat. 182, 183, the Fleet Corporation in 1919, before delivery of all the lumber, had cancelled the contract with decedent for building the tugs and directed him "to make no further commitments or expenditures"; and that this action or the decedent's subsequent order to petitioner to stop delivery of the lumber, or both, amounted to a cancellation of petitioner's contract also.

By written stipulation a jury was waived and the case was tried to the court, which made special findings, among others, that petitioner, at the time of entering into its contract with decedent, knew that the lumber was to be furnished for the building of tugs, but did not know that decedent was building the tugs for the Fleet Corporation. The court also found that decedent had stopped deliveries of the lumber but there is no finding that this was done or purported to be done under the authority of the Fleet

Corporation. It was found that petitioner's damage was $647.65, the difference between the contract price of the lumber ready for delivery when the decedent ordered performance stopped and its market price when recut into saleable lengths, but that if the ordinary rule of damages should be applied petitioner's loss of bargain on the whole contract would bring its damages up to $42,789.96. The court gave judgment for the smaller amount, 6 Fed. (2d) 471, and this was affirmed by the court of appeals for the sixth circuit, 13 Fed. (2d) 581. This Court granted certiorari. 273 U. S. 684.

The Urgent Deficiencies Appropriation Act of 1917 authorized the President "(b) To modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material." It provided that the United States "shall make just compensation" for any contracts cancelled or requisitioned, and authorized the President to delegate the powers conferred upon him. His powers, so far as material here, were delegated to the Fleet Corporation by Executive Orders of July 11, 1917, and December 3, 1918. The statute authorized the cancellation of the government's own contracts, made after its enactment, and just compensation for such cancellation does not include anticipated profits, ordinarily recoverable in an action of assumpsit. *Duesenberg Motors Corp.* v. *United States,* 260 U. S. 115; *Russell Motor Car Co.* v. *United States,* 261 U. S. 514. It authorized also the expropriation or requisition of private contracts, and in computing the just compensation for these the value of the anticipated performance of the contract may be considered. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 125.

The court below ruled that the petitioner's contract was cancelled by the action of the Shipping Board but upheld

the judgment for $647.65 in favor of petitioner. Although the suit was for breach of contract against a private person and not against the government, the court purported to apply the rule of "just compensation," which by the statute is made the limit of the government's liability, and denied a recovery for anticipated profits on the supposed authority of *Duesenberg Motor Corp.* v. *United States, supra.*

The question principally argued here was whether there was power in the Fleet Corporation to cancel the petitioner's contract. No such question is presented by the record. There is no finding that in fact the petitioner's contract was either modified, suspended, cancelled or requisitioned, nor does the record disclose evidence which would support such a finding. Since a jury was waived in writing, appellate review is limited to the sufficiency of the facts specially found to support the judgment and to rulings excepted to and presented by a bill of exceptions. Rev. Stat. §§ 649, 700; *Lewellyn* v. *Electric Reduction Co., ante,* p. 243; *Fleischmann Co.* v. *United States,* 270 U. S. 349; *Tyre & Springs Works Co.* v. *Spalding,* 116 U. S. 541; *Boogher* v. *Insurance Co.,* 103 U. S. 90. The special findings already stated establish the right of petitioner to recover damages for breach of contract, including compensation for loss of bargain, in the sum of $42,789.96.

As petitioner's contract was framed without reference to or knowledge of decedent's contract with the Fleet Corporation, its rights under its own contract were not dependent on the continued existence of the other. *Guerini Stone Co.* v. *Carlin,* 240 U. S. 264.

The judgments of the district court and of the circuit court of appeals are accordingly reversed and set aside and the judgment of this Court will be for the petitioner in the amount stated, with costs.

Reversed.

Counsel for Parties

NAGLE, COMMISSIONER, *v.* LOI HOA.

NAGLE, COMMISSIONER, *v.* LAM YOUNG.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 115 and 116. Argued December 5, 1927.—Decided January 3, 1928.

1. Under § 6 of the Chinese Exclusion Act, as amended, which provides that Chinese entitled to enter the United States shall be identified by the Chinese Government or "such other foreign Government of which at the time such Chinese person shall be a subject," the term "subject" is used in its narrower sense and includes only those who by birth or naturalization owe permanent allegiance to the government issuing the certificates. P. 477.
2. Therefore, Chinese cannot enter on a certificate of a government other than China to which they owe only temporary allegiance, though residing and transacting business within its territory. P. 477.
3. Reënactment of a statutory provision without change is a legislative approval of the practical construction that it had received. P. 481.

13 F. (2d) 80, reversed.

CERTIORARI, 273 U. S. 682, to judgments of the Circuit Court of Appeals which reversed judgments of the District Court dismissing petitions in *habeas corpus* brought by the above-named respondents against an immigration officer.

Solicitor General Mitchell, with whom *Assistant Attorney General Luhring* and *Messrs. Harry S. Ridgely* and *F. M. Parrish,* Attorneys in the Department of Justice, were on the brief, for petitioner.

Messrs. George W. Hott and *Joseph P. Fallon* were on the brief for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondents, Chinese merchants born in China and never naturalized elsewhere, applied at the port of San Francisco for admission into the United States. They had resided in French Indo-China and been engaged in business there for a number of years. They presented to the immigration authorities certificates of identification issued by officials of French Indo-China with visas by the American Consul at Saigon, French Indo-China. They were denied admission on the ground that the certificate of identification required by § 6 of the Chinese Exclusion Act, Act of May 6, 1882, c. 126, 22 Stat. 58, 60, as amended by the Act of July 5, 1884, c. 220, 23 Stat. 115, 116, 117; U. S. C., Title 8, § 265, was a certificate of the government of which respondents were subjects, in this case the Chinese government, and not a certificate of the government of French Indo-China, where respondents merely resided. Their petitions for writs of habeas corpus were denied by the district court for northern California. On appeal the two cases were consolidated in the court of appeals for the ninth circuit, and the judgments of the district court reversed. 13 Fed. (2d) 80. This Court granted certiorari. 273 U. S. 682.

Article II of the treaty of November 17, 1880, between the United States and China, 22 Stat. 826, 827, provides for the admission of Chinese subjects "proceeding to the United States as . . . merchants." Section 15 of the Exclusion Act, as amended, makes the act applicable "to all subjects of China and Chinese, whether subjects of China or any other foreign power." Section 6 as amended (the relevant portions are in the margin[1]) requires

[1] "Sec. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the

"every Chinese person other than a laborer, who may be entitled by said treaty or this act" to admission, to "obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject." The sole question presented is whether the word "subject" as used in § 6 is to be taken as including only those persons who by birth or naturalization owe permanent allegiance to the government issuing the certificate, or as embracing also those who, being domiciled within the territorial limits of that government, owe it for that reason obedience and temporary allegiance.

The word may be used in either sense. See *The Pizarro,* 2 Wheat. 227, 245; *Carlisle* v. *United States,* 16 Wall. 147, 154. If the narrower meaning be the appropriate one the respondents were "subjects" of the Chinese government, and it alone could issue certificates entitling them to admission. The government of French Indo-China could issue such certificates only to persons of the Chinese race who owed it permanent allegiance.

The circuit court of appeals thought that since the statute was in execution of a treaty with China—which related only to the immigration of Chinese nationals—the provisions in § 6 for the certification of identity could have no application to persons of Chinese race who were nationals of other governments, and so concluded that certificates were required of governments other than China only in the case of Chinese nationals resident under those governments.

But in this view it is overlooked that the amended Exclusion Act is broader than the treaty. Before the amendment the federal courts had not agreed whether

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permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject. . . ."

persons of Chinese race who were nationals of countries other than China were affected by the statute. *United States* v. *Douglas,* 17 Fed. 634; *In re Ah Lung,* 18 Fed. 28. Section 15 of the amended act made all its provisions applicable "to all subjects of China and Chinese, whether subjects of China or any other foreign power." The avowed purpose of the amendment was to alter the act as interpreted in *United States* v. *Douglas, supra,* where it had been held to have no application to Chinese subjects of Great Britain. Report of Committee on Foreign Affairs, 48th Cong., 1st Sess., H. Rep. 614, p. 2.[2] The purpose, therefore, of the insertion in § 6 of the phrase "of such other foreign Government of which at the time such Chinese person shall be a subject," was to require Chinese immigrants owing permanent allegiance to governments other than China to present certificates from the governments of their allegiance.

Something may be said in support of the view that the more usual and, perhaps, more accurate use of the word "subject" is that contended for by the government. U. S. Const., Art. III, § 2; *Hammerstein* v. *Lyne,* 200 Fed. 165; Dicey, Conflict of Laws (2d ed.) 164. It is so used in our immigration and naturalization laws. Act of February 5, 1917, c. 29, § 20, 39 Stat. 874, 890; Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596. It may be said also that the importance of administrative convenience

[2] The very fact that the amended act went beyond the scope of the treaty and affected Chinese nationals of powers other than China was one source of the objections of the Committee minority. "It is perhaps worthy of notice that this section not only attempts to make more stringent restrictive regulations against Chinese laborers, subjects of China, with whom we have some show of right, under a treaty, to make them, and against the Chinese subjects of other nations, with whom we have no such treaty stipulations, but that its other provisions unquestionably exceed the scope of the treaty with China." Report of Committee on Foreign Affairs, Views of the Minority, 48th Cong. 1st Sess., H. Rep. 614, p. 5.

and certainty in a statute of this character suggests that the word was used as indicating citizenship by birth or naturalization, a status more easily ascertained than that of domicile or residence. But these considerations need not detain us in view of the history of the legislation, to which we have already referred, and of the long and consistent practical construction of the act.

Both governments appear to have treated § 6, as amended, as requiring the certificate to be issued by the Chinese government, except where the immigrant owes permanent allegiance to another foreign government.[3] The administrative regulations of the various departments have from the first required that the certificates of Chinese subjects coming from countries other than China be issued by Chinese consular officers.[4]

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[3] On December 6, 1884, in pursuance of the amendment of that year, the Secretary of the Treasury declared in a circular to the officers of the customs that "Chinese subjects . . . desiring to come to the United States from countries other than China, may do so on production of a certificate . . . to be issued by a Chinese diplomatic or consular officer, or if there be no such Chinese officer at such port, on a like certificate to be issued by a United States consular officer." Foreign Relations, 1885, p. 192. Although this regulation, in so far as it permits the original issue of certificates to be made by American consular officers, went beyond the statute, it clearly indicates that Chinese nationals resident abroad were required to procure certificates not from the government of their residence but from the Chinese government or an American consular officer. In the case of certain Chinese merchants resident in Hong Kong, the Chinese government requested that the statute and regulation be so applied. Memorandum, received August 5, 1885, Mr. Cheng Tsao Ju to Mr. Bayard, Foreign Relations, 1885, p. 184. To this the State Department acceded. Mr. Bayard to Cheng Tsao Ju, August 11, 1885, Foreign Relations, 1885, p. 185.

[4] Treasury circular, Dec. 6, 1884, *supra*, footnote 3; Treasury circular No. 7, January 14, 1885; Consular instruction of April 15, 1905, by the Secretary of State, 6 MS. Instructions to Diplomatic and Consular Officers; Chinese Exclusion Regulations, May 3, 1905, Department of Commerce and Labor, Rule 33; Regulations, February

This interpretation was accepted by President Cleveland in his special message of April 6, 1886.[5] 8 Richardson, Messages and Papers of the Presidents, 391. He recommended legislation permitting the certificate in the case of Chinese nationals, resident in other foreign countries where there were no Chinese consular officers, to be issued by United States consuls in those countries. The Chinese government has uniformly authorized its diplomatic and consular officers in foreign countries to issue such certificates in the case of Chinese subjects resident there.[6] The validity of such certificates issued to Chinese subjects by consular officers of China in other foreign

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5, 1906, Department of Commerce and Labor, Rule 30; Regulations, February 26, 1907, Department of Commerce and Labor, Rule 30; Regulations, April 18, 1910, Department of Commerce and Labor, Rule 10; Regulations, Department of Labor, January 24, 1914; *id.*, October 15, 1915; *id.*, October 27, 1916; *id.*, May 1, 1917; *id.*, October, 1920; *id.*, October 1, 1926.

[5] The President thus stated the effect of § 6: It "provides in terms for the issuance of certificates in two cases only: (a) Chinese subjects departing from a port of China; and (b) Chinese persons (i. e., of the Chinese race) who may at the time be subjects of some foreign government other than China, and who may depart for the United States from the ports of such other foreign government

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"It is sufficient that I should call the earnest attention of Congress to the circumstance that the statute makes no provision whatever for the somewhat numerous class of Chinese persons who, retaining their Chinese subjection in some countries other than China, desire to come from such countries to the United States."

He recognized that the amended statute went beyond the scope of the treaty by saying, "A statute is certainly most unusual which, purporting to execute the provisions of a treaty with China in respect of Chinese subjects, enacts strict formalities as regards the subjects of other governments than that of China." 8 Richardson, Messages and Papers of the Presidents, 391, 392.

[6] Mr. Tsui to Mr. Wharton, June 2, 1891, Foreign Relations, 1891, p. 457; Mr. Yang Yu to Mr. Gresham, October 10, 1893, Foreign Relations, 1893, p. 260.

countries has been recognized by the Department of State and upheld by the Attorney General.[7]

Added weight is given to this course of practical construction by the history of Article III of the treaty with China of March 17, 1894, 28 Stat. 1210, and of the later legislation reënacting the Exclusion Act. Article III provided that Chinese subjects entitled to admission might "produce a certificate from their Government or the Government where they last resided." The very fact that it was thought necessary to incorporate this provision in the treaty is a recognition that the preëxisting legislation did not have that effect. The treaty expired by limitation in 1904 and was not renewed. While it was in force Chinese nationals, resident abroad, could be admitted to the United States on presentation of a certificate either of the Chinese government, as authorized by § 6, or of the government of their residence, as permitted by the treaty.[8] During the life of the treaty, the amended Exclusion Act, continued in force for ten years from May 5, 1892 by the act of that date, c. 60, § 1, 27 Stat. 25, would have expired. But by the Act of April 29, 1902, c. 641, § 1, 32 Stat. 176, "all laws now in force . . . regulating the coming of Chinese persons . . . into the United States . . . are hereby, reenacted, extended and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law." By this statute the certificate provisions of § 6 of the amended Exclusion Act were continued indefinitely and, on the expiration in 1904 of the treaty of 1894, became the only law on that subject. The reën-

[7] Mr. Wharton to Mr. Tsui, June 17, 1891, Foreign Relations, 1891, p. 459; 20 Op. Atty. Gen. 693.

[8] The Attorneys General at one time thought that the treaty provided an exclusive method of certification for Chinese nationals resident outside of China. 21 Op. Atty. Gen. 347; 22 Op. Atty. Gen. 201; but see Mr. Wu to Mr. Hay, November 7, 1898, Foreign Relations, 1899, pp. 190, 191.

actment of § 6 unchanged, and subject only to the provisions of a treaty now expired, must be accepted as a legislative approval of the practical construction the section had received. Compare *National Lead Co.* v. *United States*, 252 U. S. 140.

If there could be doubt as to the proper interpretation of § 6 standing alone, we think all ambiguity has been removed by the history of the legislation and the practical construction which has been given to it.

Reversed.

DECISIONS PER CURIAM, FROM OCTOBER 3, 1927, TO AND INCLUDING JANUARY 3, 1928, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. 101. BOARD OF PUBLIC UTILITY COMMISSIONERS *v.* MIDDLESEX WATER COMPANY. Appeal from the District Court of the United States for the District of New Jersey. Motion to dismiss submitted October 3, 1927. Decided October 10, 1927. *Per Curiam.* Motion to dismiss granted on the authority of *Smith* v. *Wilson,* 273 U. S. 388. *Mr. Frank Bergen* for appellee in support of the motion. *Messrs. Thomas Brown* and *A. M. Barber* for appellant in opposition thereto.

No. 253. B. S. WHEELER AND M. S. GALASSO *v.* GALEN D. PUE. Error to the Supreme Court of the State of Montana. Motion to dismiss submitted October 3, 1927. Decided October 10, 1927. *Per Curiam.* Motion to dismiss granted under § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the certiorari is denied under the authority of *Taubel, etc., Co.* v. *Fox,* 264 U. S. 426, 429; *Liberty Bank* v. *Bear,* 265 U. S. 365, 369. *Mr. H. L. Maury* for defendant in error in support of the motion. *Mr. James H. Baldwin* for plaintiff in error in opposition thereto.

No. 276. COUNTY OF DELAWARE, PENNSYLVANIA, *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION; and

No. 277. SCHOOL DISTRICT OF TINICUM TOWNSHIP, PENNSYLVANIA, *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. Error to the Circuit Court

of Appeals for the Third Circuit. Motion to dismiss submitted October 3, 1927. Decided October 10, 1927. *Per Curiam.* Motion to dismiss granted on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937). *Solicitor General Mitchell* for defendant in error, in support of the motion. *Mr. Donald S. Edmonds* for plaintiff in error, in opposition thereto.

No. —, original, Ex parte Turner. October 10, 1927. The motions of *Frank Turner pro se,* for leave to file a petition for a writ of *habeas corpus* in this case and to proceed *in forma pauperis* therein are both denied, with leave to the petitioner to apply to the District Judges for the Northern District of California, or to the Circuit Judges therein for hearing of such petition.

No. 165. O. E. Harlin, Norta Harlin, and the American Investment Company *v.* Mary Gage, Columbus Le Flore and Lorena Le Flore. Error to the Supreme Court of the State of Oklahoma. October 10, 1927. *Per Curiam.* Writ of error dismissed under § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936), and, treating the writ of error as an application for a writ of certiorari at the request of the parties, the application for certiorari is denied. *Messrs. Robert M. Rainey* and *Streeter B. Flynn* for petitioners. *Mr. W. B. Means* for respondents.

No. 370. F. H. Fullwood *v.* City of Canton, Ohio, et al. Error to the Supreme Court of the State of Ohio. Motion submitted October 3, 1927. Decided October 17, 1927. *Per Curiam.* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted

record, finds that no Federal question is presented, and the writ of error is therefore also dismissed on the authority of *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham*, 253 U. S. 193, 195. The costs already incurred herein, by direction of the Court, shall be paid by the Clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. Faber J. Drukenbrod* for plaintiff in error. No appearance for defendants in error.

No. 157. UNITED STATES *v.* W. A. MCFARLAND AND J. NORRIS MCFARLAND, COPARTNERS. On writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. October 17, 1927. *Per Curiam.* The decision of this case does not require a decision of the questions which are presented in the petition for certiorari because of which the writ was granted, and the certiorari heretofore granted in this case is therefore revoked upon the authority of *Southern Power Co.* v. *North Carolina Service Co.*, 263 U. S. 508. *Solicitor General Mitchell* for the United States. *Messrs. Wm. H. Hudgins* and *Lothrop Withington* for respondents.

No. 13. REBA FENWICK *v.* OREL J. MYERS, PROSECUTING ATTORNEY, DARKE COUNTY, OHIO. Error to the Supreme Court of the State of Ohio. Submitted October 11, 1927. Decided October 17, 1927. *Per Curiam.* Dismissed for want of jurisdiction for lack of a substantial Federal question on the authority of *Seaboard Air Line Ry. Co.* v. *Padgett*, 236 U. S. 668, 671; *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham*, 253 U. S. 193, 195. *Messrs. George W. Mannix, Jr.* and *T. A. Billingsley* for plaintiff in error. *Messrs. Edward C. Turner* and *Orel J. Myers* for defendant in error.

No. 111. RED STAR MOTOR DRIVERS ASSOCIATION ET AL. *v.* CITY OF DETROIT, JAMES W. INCHES, COMMISSIONER OF POLICE, ET AL. Error to the Supreme Court of the State of Michigan. Argued October 3, 1927. Decided October 17, 1927. *Per Curiam.* Dismissed for want of a substantial Federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Edward N. Barnard,* with whom *Mr. Reeves T. Strickland* was on the brief, for plaintiffs in error. *Messrs. Charles P. O'Neil, Charles S. Whitman* and *Clarence E. Page* were on the brief for defendants in error.

No. 88. J. MELL BROOKS AND BLYTHEVILLE SPECIAL SCHOOL DISTRICT No. 5 *v.* RALPH KOONCE, STATE TREASURER. Argued October 3, 1927. Decided October 17, 1927. *Per Curiam.* Affirmed on the authority of *Mills County* v. *Railroad Company,* 107 U. S. 557, 566; *Alabama* v. *Schmidt,* 232 U. S. 168, 173; *King County* v. *Seattle School District No. 1,* 263 U. S. 361, 364. *Mr. P. A. Lasley,* with whom *Mr. C. A. Cunningham* was on the brief, for plaintiffs in error. *Messrs. H. W. Applegate, J. S. Utley* and *William T. Hammock* were on the brief for defendant in error.

No. 188. SOUTHERN CALIFORNIA EDISON COMPANY *v.* AMELIA HERMINGHAUS ET AL. On writ of certiorari to the Supreme Court of the State of California. Argued October 6, 1927. Decided October 17, 1927. *Per Curiam.* Dismissed for want of a Federal question on the authority of *Tracy* v. *Ginzberg,* 205 U. S. 170, 178; *Bonner* v. *Forman,* 213 U. S. 86, 91; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112. *Mr. Edward F. Treadwell,* with whom *Messrs. George E. Trowbridge, Wm. M. Conley* and *John*

W. Davis were on the brief, for petitioner. *Messrs. James F. Peck, Robert Duncan* and *Annette A. Adams* were on the brief for respondents.

No. 44. DUNBAR-DUKATE COMPANY, INCORPORATED, *v.* THE CELESTE SUGAR COMPANY, INCORPORATED. Error to the Supreme Court of the State of Louisiana. Motion to substitute submitted October 10, 1927. Decided October 24, 1927. *Per Curiam.* The motion to substitute party for defendant in error is denied for the reason that the absence of a substantial federal question requires the Court to grant the motion to dismiss on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Rush L. Holland, George E. Strong* and *C. F. Borah* for defendant in error in support of the motion. *Messrs. John Dymond, A. Griffin Levy* and *James Wilkinson* for plaintiff in error in opposition thereto.

No. —, original. EX PARTE MODERN WORKMEN OF THE WORLD AND THE MODERN WORKMEN OF THE WORLD SOCIETY, JOHN B. KINNEAR AND SAMUEL J. MASTERS. October 24, 1927. Motion for leave to file petition for writ of *mandamus* herein denied. *Messrs. W. Bissell Thomas, Walter H. Newton* and *J. K. M. Norton* for petitioners.

No. 586. LULU MIGNON MURPHY *v.* EUGENIE R. BIRD, ADMINISTRATRIX, ET AL. On petition for a writ of certiorari to the Supreme Court of the State of Louisiana. October 24, 1927. *Per Curiam.* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no substantial

Federal question presented upon which jurisdiction for certiorari could be based, application for which is therefore also denied on the authority of *Tracy* v. *Ginzberg*, 205 U. S. 170, 178; *Bonner* v. *Gorman*, 213 U. S. 86, 91; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Lulu Mignon Murphy, pro se.* No appearance for respondents.

No. 32. JENNIE M. BLAIR, NEE ADAIR, *v.* SAM F. WILKERSON ET AL. Error to the Supreme Court of the State of Oklahoma. Submitted October 13, 1927. Decided October 24, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the certiorari is denied for the reason that, if granted, the case would have to be affirmed on the authority of *Gilcrease* v. *McCullough*, 249 U. S. 178. *Messrs G. L. Grant, Henry Warrum* and *E. M. Frye* for plaintiff in error. *Mr. W. A. Chase* for defendants in error.

No. 16. PEOPLE OF THE STATE OF NEW YORK, EX REL. INTERNATIONAL BRIDGE COMPANY, *v.* STATE TAX COMMISSION. Error to the Supreme Court of the State of New York. Argued October 13, 1927. Decided October 24, 1927. *Per Curiam.* Affirmed on the authority of *International Bridge Co.* v. *New York*, 254 U. S. 126. *Mr. S. Fay Carr*, with whom *Mr. Adelbert Moot* was on the brief, for plaintiff in error. *Mr. Herbert A. Hickman*, with whom *Messrs. Albert Ottinger*, Attorney General of New York, and *Frederick C. Rupp* were on the brief, for defendant in error.

No. 20. THOMAS W. PHILLIPS, JR., ET AL., SUBSTITUTED FOR OKLAHOMA NATURAL GAS COMPANY, A CORPORATION, *v.* OKLAHOMA ET AL. Error to the Supreme Court of the State of Oklahoma. Argued October 13, 14, 1927. Decided October 24, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the certiorari is denied for want of a substantial Federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 551, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Charles B. Cochran,* with whom *Messrs. C. B. Ames* and *Russell G. Lowe* were on the brief, for plaintiff in error. *Mr. E. S. Ratliff,* with whom *Messrs. Edwin B. Dabney* and *George F. Short* were on the brief, for defendants in error.

No. 21. STATE OF MISSOURI, EX REL. WASHINGTON UNIVERSITY, *v.* PUBLIC SERVICE COMMISSION OF MISSOURI AND UNION ELECTRIC LIGHT & POWER COMPANY;

No. 22. SAME *v.* SAME;

No. 23. STATE OF MISSOURI, EX REL. ST. LOUIS BREWING ASSOCIATION, *v.* SAME;

No. 24. SAME *v.* SAME;

No. 25. STATE OF MISSOURI, EX REL. WAINWRIGHT REAL ESTATE COMPANY, *v.* SAME;

No. 26. SAME *v.* SAME; and

No. 27. STATE OF MISSOURI, EX REL. HOTEL STATLER COMPANY, INC., *v.* SAME. Error to the Supreme Court of the State of Missouri. Argued October 14, 1927. Decided October 24, 1927. *Per Curiam.* The writs of error are dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating

the writs of error as applications for certiorari, the applications are denied for want of a substantial federal question on the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Messrs. Charles M. Polk, Marion C. Early* and *Charles Nagel* for plaintiffs in error. *Mr. Theodore Rassieur*, with whom *Messrs. J. P. Painter* and *Jerry A. Matthews* were on the brief, for defendants in error.

No. 28. H. C. Haas *v.* L. Greenwald and Walter W. Stevens. Error to the Supreme Court of the State of California. Argued October 14, 1927. Decided October 24, 1927. *Per Curiam.* Affirmed on the authority of *Bratton* v. *Chandler*, 260 U. S. 110, 115. *Mr. Jeremiah F. Sullivan* for plaintiff in error, submitted. *Mr. Nathan W. MacChesney*, with whom *Mr. Wm. F. Humphrey* was on the brief, for defendants in error.

No. 31. New York Central Railroad Company *v.* Wheeling Can Company. On writ of certiorari to the Supreme Court of Appeals of the State of West Virginia. Argued October 14, 1927. Decided October 24, 1927. Reversed on the authority of *United States* v. *St. Louis, San Francisco and Texas Ry. Co.*, and *United States* v. *Wabash Ry. Co.*, 270 U. S. 1, 3; and the cause remanded to the said Supreme Court of Appeals for further proceedings. *Mr. Joseph R. Curl*, with whom *Mr. John C. Palmer* was on the brief, for petitioner. No appearance for respondent.

No. 35. Bloecher & Schaaf, Inc., et al. *v.* Mayor and City Council of Baltimore and Hampson Jones, Commissioner of Health. Error to the Court of Appeals of the State of Maryland. Argued October 17, 1927. De-

cided October 24, 1927. *Per Curiam.* Affirmed on the authority of *Watson* v. *Maryland,* 218 U. S. 173, 178; *Adams* v. *Milwaukee,* 228 U. S. 572, 579, 582. *Mr. Emory H. Niles,* with whom *Messrs. Alfred S. Niles* and *Joseph W. Starlings* were on the brief, for plaintiffs in error. *Mr. Charles C. Wallace* was on the brief for defendants in error.

No. 47. COBB BRICK COMPANY *v.* CLARA C. LINDSAY. Error to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas. Submitted October 18, 1927. Decided October 24, 1927. *Per Curiam.* It is now here ordered and adjudged by this Court that the judgment of the Court of Civil Appeals of the State of Texas in this cause be, and the same is hereby, vacated, and this cause be, and the same is hereby, remanded, without costs to either party, to the said Court of Civil Appeals with directions for further proceedings in the light of the decision of the Supreme Court of Texas in *Magnolia Petroleum Co.* v. *Hamilton,* 283 S. W. 475, and of the decisions of this Court in *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Commission,* 273 U. S. 126; *Dorchy* v. *Kansas,* 264 U. S. 286; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis,* 224 U. S. 503. *Messrs. Ellis Douthit* and *George Thompson, Jr.,* for plaintiff in error. *Messrs. Gillis A. Johnson* and *R. E. Rouer* for defendant in error.

No. 45. R. C. BREEN ET AL. *v.* MORTON DENISON HULL ET AL. Error to the Supreme Court of the State of Minnesota. Argued October 19, 1927. Decided October 24, 1927. *Per Curiam.* Dismissed for want of a Federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. The Chief Justice took no part in the consideration or decision of this case. *Mr.*

H. V. Mercer, with whom *Messrs. H. B. Fryberger* and *Harvey Hoshour* were on the brief, for plaintiffs in error. *Messrs. Frank D. Adams, Elmer F. Blu, George W. Morgan, Nathan L. Miller* and *Kenneth B. Halstead* were on the brief for defendants in error.

No. 46. THOMAS H. DENT, ADMINISTRATOR, *v.* JAMES S. SWILLEY. Error to the Court of Civil Appeals, Ninth Supreme Judicial District, State of Texas. Argued October 19, 1927. Decided October 24, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the certiorari is denied for want of a substantial Federal question on the authority of *Tracy* v. *Ginzberg,* 205 U. S. 170, 178; *Bonner* v. *Gorman,* 213 U. S. 86, 91; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112. *Mr. Wm. L. Houston,* with whom *Messrs. Winford H. Smith, Charles H. Bates* and *Thomas H. Dent, pro se,* were on the brief, for plaintiff in error. *Mr. Thomas B. Dupree* was on the brief for defendant in error.

No. 54. A. W. MELLON, DIRECTOR GENERAL, *v.* L. E. MCKINLEY. On writ of certiorari to the Court of Appeals of the State of Kentucky. Argued October 19, 20, 1927. Decided October 24, 1927. *Per Curiam.* The grounds which were presented in the petition for certiorari, because of which the writ was granted, do not prove to have a substantial basis in the record, and the certiorari heretofore granted in this case is therefore vacated upon the authority of *United States* v. *McFarland, ante,* p. 485; *Southern Power Co.* v. *North Carolina Service Co.,* 263

U. S. 508; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440. *Mr. Ashby M. Warren* for petitioner. *Mr. Thomas C. Mapother* was on the brief for respondent.

No. 59. GEORGE D. IVERSON, JR., *v.* ILLINOIS GLASS COMPANY. Error to the Court of Appeals of the State of Maryland. Argued October 20, 1927. Decided October 24, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the certiorari is denied for want of a substantial Federal question on the authority of *Tracy* v. *Ginzberg,* 205 U. S. 170, 178; *Bonner* v. *Gorman,* 213 U. S. 86, 91; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112. *Mr. Harry Zoller, Jr.,* for plaintiff in error. *Messrs. G. W. S. Musgrave* and *John H. Hessey* were on the brief for defendant in error.

No. 61. MUELLER GRAIN COMPANY *v.* AMERICAN STATE BANK OF OMAHA, NEBRASKA. On writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. Argued October 20, 21, 1927. Decided October 24, 1927. *Per Curiam.* Reversed on the authority of *Fleischman Construction Co.* v. *United States, use of Forsberg,* 270 U. S. 349, 356; *Law* v. *United States,* 266 U. S. 494, 496; and the cause remanded to the said Circuit Court of Appeals for further proceedings. *Mr. Walter H. Moses,* with whom *Messrs. Walter Bachrach* and *Clarence W. Heyl* were on the brief, for petitioner. *Messrs. Carl Meyer, Henry Russell Platt* and *David F. Rosenthal* for respondents, submitted.

No. 36. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY *v.* TEXAS. On writ of certiorari to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas. Argued October 17, 1927. Decided October 31, 1927. *Per Curiam.* In this case, in which a certiorari was granted, the writ is now vacated for the reason that the grounds advanced for the granting of the writ prove, upon an examination of the record, not to have a substantial basis. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *United States* v. *McFarland, ante*, p. 485.

In this case exception is taken by one of counsel for the respondent to seven pages of a reply brief filed by one of counsel for the petitioner. The matter excepted to is an effort by counsel for the petitioner to minimize and detract from the weight of a supplemental record which the Court permitted to be filed by a recital of correspondence and communications between opposing counsel with an intimation that, contrary to an agreement, no opportunity had been furnished to oppose the filing. Respondent's counsel asks that this brief be stricken from the files as improper. The motion is granted. The supplemental record was filed by order of the Court. No motion was made to have the order revoked or the record stricken off the files. We can not approve of this insinuating and irregular method of reflecting on opposing counsel and on the relevancy and weight of a document which the Court has permitted to be filed. *Mr. Alex H. McKnight*, with whom *Messrs. J. M. Bryson* and *C. C. Huff* were on the brief, for petitioner. *Messrs. Joseph W. Bailey* and *Luther Nickels*, with whom *Messrs. Claude Pollard, Dan Moody* and *D. A. Simmons* were on the brief, for respondent.

No. 72. FORDSON COAL COMPANY *v.* JOHN M. MOORE, SHERIFF. Error to the Court of Appeals of the State of Kentucky. Argued October 27, 1927. Decided October

31, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. *Jett Bros. Distilling Company* v. *City of Carrollton,* 252 U. S. 1, 5, 6. Treating the writ of error as an application for certiorari, the certiorari is denied for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Wallace R. Middleton,* with whom *Mr. Clifford B. Longley* was on the brief, for plaintiff in error. *Messrs. Frank E. Daugherty,* Attorney General of Kentucky, *Gardner K. Byers* and *Swagar Sherley* were on the brief for defendant in error.

No. 77. GUNDER DRAXTON ET AL. *v.* C. P. FITCH ET AL. Error to the Supreme Court of the State of Minnesota. Argued October 27, 1927. Decided October 31, 1927. *Per Curiam.* Dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. James Manahan* for plaintiffs in error, submitted. *Mr. Victor E. Anderson,* with whom *Messrs. Clifford L. Hilton,* Attorney General of Minnesota, and *James E. Markham* were on the brief, for defendants in error.

No. 80. E. G. GRIFFIN *v.* GEORGE L. POWERS ET AL. Error to the Supreme Court of the State of Tennessee. Argued October 28, 1927. Decided October 31, 1927. *Per Curiam.* Affirmed on the authority of *Dent* v. *West Virginia,* 129 U. S. 114, 122; *Douglas* v. *Noble,* 261 U. S. 165, 169, 170; *Graves* v. *Minnesota,* 272 U. S. 425, 427. *Mr. Carlisle S. Littleton* for plaintiff in error. *Messrs. John D. Keeble* and *Scott P. Fitzhugh* were on the brief for defendants in error.

No. —, original. EX PARTE CHARLES A. STUTZMAN. November 21, 1927. *Per Curiam.* The motions of *Mr. Charles A. Stutzman* for leave to file a petition for *habeas corpus* in this case and to proceed *in forma pauperis* therein are both denied for the reason that the Court, upon examination of the unprinted petition, and papers accompanying it, finds that there are no grounds upon which the writ of *habeas corpus* can be issued. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926.

No. 490. MOLLIE TIGER AND BABY CUMSEY, BY C. L. GARBER, ET AL. *v.* F. S. LOZIER ET AL. On petition for writ of certiorari to the Supreme Court of the State of Oklahoma. November 21, 1927. *Per Curiam.* The petition for certiorari is denied for the reason that the petitioner has failed to comply with section 2 of Rule 35 of the Supreme Court which provides that the "petition shall contain only a summary and short statement of the matter involved and the reasons relied upon for the issuance of the writ," and that the supporting brief must be direct and concise.

The petition for certiorari filed in this case contains no concise statement of the facts, is sixty-six pages long, and purports to set forth forty-seven "Federal Questions Arising in This Case." The petitioner's brief, of seventy-two pages, is prefaced by some twenty pages of "General Propositions of Law," and followed by an appendix of two hundred and ten pages of excerpts from the record. *Mr. Lewis C. Lawson* for petitioners. *Messrs. George S. Ramsey, Alvin Richards* and *John M. Chick* for respondents.

No. 497. WARREN E. BROWN ET AL. *v.* LOUIS H. KRIETMEYER. On petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit. November 21, 1927. *Per Curiam.* The petition for certiorari is denied for the reason that the petitioner has failed to comply with section 2 of Rule 35 of the Supreme Court, which provides that the "petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the issuance of the writ," and that the supporting brief must be direct and concise.

The petition for certiorari filed in this case is fifty-one pages long and contains no concise statement of the facts. The brief in support of the petition is seventy-two pages long and is presented separately. Both the petition and the brief have the same appendix, which is ninety pages long, and contains many references to Florida statutes. *Messrs. G. W. L. Smith* and *Robert F. Cogswell* for petitioners. *Mr. Giles J. Patterson* for respondent.

No. 558. KUNGLIG JARNVAGSSTYRELSEN, ALSO KNOWN AS THE ROYAL ADMINISTRATION OF THE SWEDISH STATE RAILWAYS, *v.* NATIONAL CITY BANK OF NEW YORK AND DEXTER & CARPENTER, INC.; and

No. 559. SAME v. DEXTER & CARPENTER, INC. On petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. November 21, 1927. *Per Curiam.* The petition for two writs of certiorari is denied for the reason that the petitioner has failed to comply with section 2 of Rule 35 of the Supreme Court, which provides that the "petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the issuance of the writ," and that the supporting brief must be direct and concise.

The petition filed in this case for the two writs of certiorari is thirty-four pages long, and the petitioner's brief filed in support thereof is one hundred ninety-six pages long, thirty-six pages of which are devoted to a statement

of the facts. *Mr. Gustav Lange, Jr.*, for petitioner. *Messrs. Charles S. Haight* and *John S. Garver* for respondents.

No. 572. GYPSY OIL COMPANY *v.* LEO BENNETT ESCOE, A MINOR, BY O. W. STEPHENS, GUARDIAN. On petition for a writ of certiorari to the Supreme Court of the State of Oklahoma. November 21, 1927. *Per Curiam.* This petition for certiorari to the Supreme Court of the State of Oklahoma is denied.

The application was not made in accordance with § 8 (a), act of February 13, 1925, c. 229, 43 Stat. 936, 940, which provides:

"No writ of error, appeal, or writ of certiorari shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

The judgment of the Supreme Court was entered March 22, 1927. A timely petition for rehearing was denied June 14, 1927. On June 18, 1927, an application for leave to file a second petition for rehearing was endorsed:

"Leave granted to file—Fred C. Branson, Chief Justice."

"On August 2, 1927, as appears from the minutes, the following proceedings were taken by the court:

"Gypsy Oil Company *v.* Escoe, et al. Application for leave to file a second petition for rehearing denied; application for oral argument denied. Fred C. Branson, Chief Justice."

On September 30, 1927, more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.

The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for

rehearing. But it begins to run from the date of denial of such petition and further suspension can not be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153, 154.

If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition. *Messrs. Chester I. Long, George E. Chamberlain, Peter Q. Nyce* and *James B. Diggs* for petitioner. *Mr. Creekmore Wallace* for respondent.

No. —, original. IN RE ABRAHAM S. GILBERT. November 21, 1927. It is ordered that the clerk issue a rule returnable Monday, December 12, 1927, addressed to Abraham S. Gilbert, of New York City, member of this bar, which shall direct—

That he make written report to this Court showing what fees or allowances have been paid to him (also when and by whom paid) for services as master in the several causes reviewed here during the October term, 1921, and reported in 259 U. S. 101, under the following titles:

Newton, as Attorney General of the State of New York, et al., v. *Consolidated Gas Company of New York; Same* v. *New York & Queens Gas Company; Same* v. *Central Union Gas Company; Same* v. *Northern Union Gas Company; Same* v. *New York Mutual Gas Light Company; Same* v. *Standard Gas Light Company of the City of New York; Same* v. *New Amsterdam Gas Company; Same* v. *East River Gas Company of Long Island City.*

That he likewise report whether he has returned or repaid any portion of the fees or allowances received by him as such master, with dates and names of the parties.

That if he has received fees or allowances as master in any of the specified causes exceeding the maximum amount held by us to be permissible, and has not returned or repaid the excess, then he shall show cause why his name ought not to be stricken from the roll of attorneys permitted to practice here and he be punished for contempt or otherwise dealt with as the circumstances may require.

No. 293. UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE ARKANSAS WESTERN RAILWAY COMPANY, FORT SMITH AND VAN BUREN RAILWAY COMPANY, ET AL. Appeal from the District Court of the United States for the Western District of Missouri. Argued November 22, 1927. Decided November 28, 1927. *Per Curiam.* Reversed and cause remanded to the District Court of the United States for the Western District of Missouri with directions to vacate the injunction decree and dismiss the petition for want of jurisdiction, on the authority of the *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299. *Mr. Blackburn Esterline,* Assistant to the Solicitor General, with whom *Solicitor General Mitchell* and *Messrs. Charles W. Needham* and *Oliver E. Sweet* were on the brief, for appellants. *Mr. Samuel W. Moore,* with whom *Mr. Frank H. Moore* was on the brief, for appellees.

No. 543. ARTHUR RICH *v.* MICHIGAN. Error to the Supreme Court of the State of Michigan. Argued November 22, 1927. Decided November 28, 1927. *Per Curiam.* Dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr* 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Messrs. Harry E. Kelly*

and *Thornton M. Pratt*, with whom *Messrs. Richard S. Doyle* and *Carl H. Zeiss* were on the brief, for plaintiff in error. *Messrs. Wm. W. Potter* and *Wilbur M. Brucker* were on the brief for defendant in error.

No. 346. FINKELSTEIN & KOMMEL *v.* UNITED STATES. On writ of certiorari to the Court of Customs Appeals. Argued November 22, 1927. Decided November 28, 1927. *Per Curiam.* Reversed on the authority of *United States v. Fish*, 268 U. S. 607, 612; the decision being that § 489 of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 962; U. S. C., Title 19, § 361) does not forbid the Customs Court to adopt rules of practice permitting the filing of such petitions before liquidation, that it has jurisdiction to consider petitions so filed, and its decision in this case granting the petition was not ineffective for want of jurisdiction. *Mr. Frederick W. Brooks, Jr.*, for petitioners. *Solicitor General Mitchell*, with whom *Mr. Cyril S. Lawrence* was on the brief, for the United States.

No. 89. E. W. BLISS COMPANY *v.* UNITED STATES. On writ of certiorari to the Court of Claims. Argued November 29, 1927. Decided November 29, 1927. *Per Curiam.* Judgment reversed and cause remanded to the Court of Claims for further findings. Counsel to enter into a stipulation as to the form of judgment to be entered in the Court of Claims. *Mr. Wm. B. King*, with whom *Messrs. Bynum E. Hinton, George A. King* and *George R. Shields* were on the brief, for petitioner. *Solicitor General Mitchell*, with whom *Assistant Attorney General Galloway* and *Messrs. Perry W. Howard* and *Louis R. Mehlinger* were on the brief, for the United States. See *post*, p. 509.

No. 94. MAYOR AND BOARD OF ALDERMEN OF THE CITY OF NATCHEZ *v.* S. B. MCNEELY AND MRS. LOUISA MCNEELY, ADMINISTRATRIX; and

No. 108. MRS. LOUISA MCNEELY, ADMINISTRATRIX, *v.* MAYOR AND BOARD OF ALDERMEN OF THE CITY OF NATCHEZ. Appeals from the Circuit Court of Appeals for the Fifth Circuit. Submitted November 28, 1927. Decided December 5, 1927. *Per Curiam.* Affirmed on the authority of *Mayor and Board of Aldermen of the Town of Vidalia* v. *McNeely, Administratrix,* and *McNeely, Administratrix,* v. *Mayor and Board of Aldermen of the Town of Vidalia,* 274 U. S. 630. *Mr. John B. Brunini* for appellants in No. 94 and appellees in No. 108. *Messrs. L. T. Kennedy* and *Hugh Tullis* for appellees in No. 94 and appellant in 108.

No. 82. COMMERCIAL NATIONAL BANK OF MILES CITY, MONTANA, AND W. M. TURNER, RECEIVER, *v.* CUSTER COUNTY AND JOHN E. DECARLE, COUNTY TREASURER.

No. 83. SAME v. SAME; and

No. 84. MILES CITY NATIONAL BANK OF MILES CITY, MONTANA *v.* SAME. Error to the Supreme Court of the State of Montana. Argued November 28, 1927. Decided December 5, 1927. *Per Curiam.* Reversed on the authority of *First National Bank of Hartford* v. *Hartford,* 273 U. S. 548, 559, 560; *Minnesota* v. *First National Bank of St. Paul,* 273 U. S. 561, 567, 568. *Mr. Charles H. Loud,* with whom *Messrs. George N. Brown* and *Lewis J. Wallace* were on the brief, for plaintiffs in error. *Messrs. Rudolph Nelstead* and *A. H. Angstman,* with whom *Mr. L. A. Foot* was on the brief, for defendants in error.

No. 86. COMMERCIAL NATIONAL BANK OF COUNCIL BLUFFS, IOWA, ET AL. *v.* GEORGE A. BURKE, COUNTY AUDITOR, ET AL. Error to the Supreme Court of the State

of Iowa. Argued November 28, 1927. Decided December 5, 1927. *Per Curiam.* Writ of error is dismissed for want of a final judgment in the highest court of the State as required by § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), on the authority of *Haseltine* v. *Central Bank of Springfield (No. 1)*, 183 U. S. 130, 131; *Arnold* v. *United States*, 263 U. S. 427, 434. *Mr. George S. Wright* for plaintiff in error. *Mr. Charles E. Swanson* was on the brief for defendants in error.

No. 87. E. PAUL YASELLI *v.* GUY D. GOFF. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Argued November 28, 29, 1927. Decided December 5, 1927. *Per Curiam.* Affirmed on the authority of *Bradley* v. *Fisher*, 13 Wall. 335, 347; *Alzua* v. *Johnson*, 231 U. S. 106, 111. *Mr. S. Lawrence Miller*, with whom *Messrs. Alfred Circeo* and *E. Paul Yaselli, pro se*, were on the brief, for petitioner. *Messrs. James M. Beck* and *J. Harlin O'Connell*, with whom *Mr. Nathan A. Smyth* was on the brief, for respondent.

No. 90. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY AND EWING NORWOOD AND A. F. FISHER *v.* RAILROAD COMMISSION OF TEXAS. Error to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas. Argued November 29, 1927. Decided December 5, 1927. *Per Curiam.* Affirmed on the authority of *Railroad Commission of California* v. *Southern Pacific Company*, 264 U. S. 331, 345. *Mr. W. L. Cook*, with whom *Messrs. Frank Andrews* and *Samuel B. Dabney* were on the brief, for plaintiffs in error. *Mr. D. A. Simmons*, with whom *Messrs. Claude Pollard, Charles H. Bates, Dan Moody* and *J. H. Tallichet* were on the brief, for defendants in error.

No. 91. STANDARD OIL COMPANY AND CLAUDE E. SHAMP v. CITY OF LINCOLN ET AL. Error to the Supreme Court of the State of Nebraska. Argued November 29, 30, 1927. Decided December 5, 1927. *Per Curiam.* Affirmed on the authority of *Jones* v. *City of Portland,* 245 U. S. 217, 224, 225; *Green* v. *Frazier,* 253 U. S. 233, 242. *Messrs. Wm. H. Herdman* and *L. A. Flansburg,* with whom *Mr. Eugene J. Hainer* was on the brief, for plaintiffs in error. *Mr. C. Petrus Peterson* was on the brief for defendants in error.

No. 104. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS *v.* J. H. KING. On writ of certiorari to the Court of Civil Appeals, 4th Supreme Judicial District, State of Texas. Submitted November 30, 1927. Decided December 5, 1927. *Per Curiam.* Reversed on the authority of *American Railway Express Company* v. *Daniel,* 269 U. S. 40, 42; *American Railway Express* v. *Levee,* 263 U. S. 19, 21; *American Railway Express Company* v. *Lindenburg,* 260 U. S. 584, 592; *Galveston, Harrisburg & San Antonio Railway Company* v. *Woodbury et al.,* 254 U. S. 357, 360; *Kansas City Southern Railway Company* v. *Carl,* 227 U. S. 639, 653, 656. *Messrs. Alexander H. McKnight, Joseph H. Bryson* and *Charles C. Huff* for petitioner. *Mr. C. A. Davies* for respondent.

No. 93. FRANCIS POWERS, ADMINISTRATOR, AND MAURICE POWERS *v.* JOSEPH KOMPOSH. Error to the Supreme Court of the State of Montana. Argued November 30, 1927. Decided December 5, 1927. *Per Curiam.* Affirmed on the authority of *Rindge Company* v. *County of Los Angeles,* 262 U. S. 700, 707, 709; *Mt. Vernon-Woodberry County Duck Company* v. *Alabama Interstate Power Company,* 240 U. S. 30, 32. *Mr. Hugh H. O'Bear,*

with whom *Messrs. Charles A. Douglas, Jo. V. Morgan* and *Frederick C. Bryan* were on the brief, for plaintiffs in error. *Mr. John G. Skinner* was on the brief for defendant in error.

No. 105. FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* STATE OF NORTH CAROLINA ON THE RELATION OF W. D. SMITH. Error to the Supreme Court of the State of North Carolina. Argued December 1, 1927. Decided December 5, 1927. *Per Curiam.* The writ of error is dismissed for want of a final judgment in the highest court of the State as required by § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), on the authority of *Haseltine* v. *Central Bank of Springfield (No. 1)*, 183 U. S. 130, 131; *Arnold* v. *United States*, 263 U. S. 427, 434. *Mr. H. G. Hudson*, with whom *Mr. Washington Bowie, Jr.*, was on the brief, for plaintiff in error. *Messrs. A. E. Holton* and *J. E. Alexander* were on the brief for defendant in error.

No. 109. S. S. KRESGE COMPANY *v.* CITY OF DAYTON, OHIO, AND GUSTAV A. NIEHUS, CHIEF INSPECTOR. Error to the Supreme Court of the State of Ohio. Argued December 2, 1927. Decided December 5, 1927. *Per Curiam.* Affirmed on the authority of *St. Louis Poster Advertising Company* v. *City of St. Louis*, 249 U. S. 269, 274; *Maguire* v. *Reardon*, 225 U. S. 271, 272; *Walls* v. *Midland Carbon Company*, 254 U. S. 300, 324. *Mr. J. B. Coolidge*, with whom *Mr. Lee Warren James* was on the brief, for plaintiff in error. *Mr. John B. Harshman* for defendants in error.

No. 125. GEORGE WELCH AND JACKOLINE WELCH *v.* WADDELL INVESTMENT COMPANY. Error to the Supreme Court of the State of Oklahoma. Submitted December 2,

1927. Decided December 5, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1, 5, 6. Treating the writ of error as an application for certiorari, the certiorari is denied. *Mr. Wm. Neff* for plaintiffs in error. *Mr. B. A. Lewis* for defendant in error.

No. 134. I. J. GORDON ET AL. *v.* W. T. RAWLEIGH COMPANY. Error to the Supreme Court of the State of Oklahoma. Argued December 9, 1927. Decided December 9, 1927. Dismissed for want of jurisdiction. Writ of certiorari denied. *Mr. Cicero I. Murray,* with whom *Mr. John B. Dudley* was on the brief, for plaintiffs in error. *Mr. Sam K. Sullivan* for defendant in error.

No. 135. CHARLES THOMASON, LENA NEILL, SURVIVING WIDOW, ET AL. *v.* W. T. RAWLEIGH COMPANY. Error to the Supreme Court of the State of Oklahoma. Argued December 9, 1927. Decided December 9, 1927. Dismissed for want of jurisdiction. Writ of certiorari denied. *Mr. Cicero I. Murray,* with whom *Mr. John B. Dudley* was on the brief, for plaintiffs in error. *Mr. Sam K. Sullivan* for defendant in error.

No. 138. F. C. LENTON, H. M. WILSON, AND E. H. RAY *v.* THE UNION NATIONAL BANK OF MINOT. Error to the Supreme Court of North Dakota. Argued December 9, 1927. Decided December 9, 1927. Dismissed for want of jurisdiction. Writ of certiorari denied. *Mr. H. L. Halverson,* with whom *Messrs. Spencer Gordon* and *Paul E. Short* were on the brief, for plaintiffs in error. *Messrs. P. A. Nestos* and *Vernon E. Sknersen* for defendant in error.

No. 137. JAY A. LARKIN *v.* E. H. PAUGH AND LINCOLN SAFE DEPOSIT COMPANY. Error to the Supreme Court of the State of Nebraska. Argued December 9, 1927. Decided December 9, 1927. *Per Curiam.* Dismissed for want of jurisdiction. Writ of certiorari granted. *Mr. Jay A. Larkin, pro se. Mr. Karl J. Knoepfler* for defendants in error.

No. —, original. EX PARTE JOSEPH Y. SAUNDERS. December 12, 1927. The petition for a writ of mandamus against R. W. Walker, judge of the Circuit Court of Appeals for the Fifth Circuit, is denied. *Mr. Joseph Y. Saunders, pro se.*

No. 98. CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* K. S. LEITCH. On writ of certiorari to the Supreme Court of Appeals of the State of West Virginia. Submitted November 29, 1927. Decided December 12, 1927 *Per Curiam.* The judgment of the Supreme Court of Appeals of the State of West Virginia in this case is affirmed by an equally divided Court. *Mr. Douglas W. Brown* for petitioner. *Messrs. George B. Martin, John H. Holt* and *Rufus S. Dinkle* for respondent.

No. 127. BACON SERVICE CORPORATION *v.* FRED C. HUSS, CAPTAIN OF THE FRESNO COUNTY TRAFFIC SQUAD. Error to the Supreme Court of the State of California. Submitted December 5, 1927. Decided December 12, 1927. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1, 5, 6. Treating the writ of error as an application for certiorari, the certiorari is denied for want of a

substantial Federal question on the authority of *Schmolke* v. *O'Brien, Chief of Police,* 273 U. S. 646; *Dorchy* v. *Kansas,* 272 U. S. 306, 308; *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668, 671. *Messrs. Jeremiah F. Sullivan* and *Theodore M. Stuart* for plaintiff in error. *Messrs. U. S. Webb* and *Frank L. Guerena* for defendant in error.

No. 122. Leo L. Spears *v.* The State Board of Medical Examiners of the State of Colorado. Error to the Supreme Court of the State of Colorado. Argued December 6, 1927. Decided December 12, 1927. *Per Curiam.* Dismissed for want of a substantial Federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Albert L. Voye,* with whom *Mr. Carle Whitehead* was on the brief, for plaintiff in error. *Messrs. Wm. L. Boatright* and *Charles H. Haines* were on the brief for defendant in error.

No. 599. Henry Hunter *v.* The State of Louisiana. Error to the Supreme Court of the State of Louisiana. Argued December 6, 1927. Decided December 12, 1927. *Per Curiam.* The judgment of the Supreme Court of the State of Louisiana in this case is affirmed for the reason that, on the record and on the facts, no substantial Federal question is presented. *Shulthis* v. *McDougal,* 226 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Lewell C. Butler,* with whom *Mr. E. H. Randolph* was on the brief, for plaintiff in error. *Mr. Aubrey M. Pyburn,* with whom *Messrs. Percy Saint* and *E. R. Schowalter* were on the brief, for defendant in error.

No. 81. OWEN P. SMITH ET AL. *v.* COMMONWEALTH OF KENTUCKY, FRANK E. DAUGHERTY, ATTORNEY GENERAL, AND ORIE S. WARE, COMMONWEALTH ATTORNEY. Error to the Court of Appeals of the State of Kentucky. Argued December 7, 8, 1927. Decided December 12, 1927. *Per Curiam.* Affirmed on the authority of *Adams* v. *City of Milwaukee,* 228 U. S. 572, 581, 583; *Laurel Hill Cemetery* v. *City and County of San Francisco,* 216 U. S. 358, 365, 366; *Dominion Hotel* v. *Arizona,* 249 U. S. 265, 268, 269; *Radice* v. *New York,* 264 U. S. 292, 296, 297. *Mr. A. O. Stanley,* with whom *Mr. Stephens L. Blakely* was on the brief, for plaintiffs in error. *Mr. Orie S. Ware,* with whom *Mr. Frank E. Daugherty* was on the brief, for defendants in error.

No. 145. WALTER W. PIERCE ET AL. *v.* OBION COMPANY FOR USE, ETC., AND MERCANTILE TRUST COMPANY. Error to the Supreme Court of the State of Tennessee. Argued December 9, 1927. Decided December 12, 1927. *Per Curiam.* Dismissed for want of a substantial Federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Thos. H. Malone,* with whom *Mr. Wm. H. Swiggart* was on the brief, for plaintiffs in error. *Mr. Charles C. Allen, Jr.,* with whom *Mr. S. A. Mitchell* was on the brief, for defendants in error.

No. 89. E. W. BLISS COMPANY *v.* UNITED STATES. On writ of certiorari to the Court of Claims. December 12, 1927. *Per Curiam.* The judgment and order entered herein on November 29, 1927, is hereby revoked, and the following is now substituted in its stead:

This Court is of opinion that the Secretary of the Navy had authority to make further contracts to pay the peti-

tioner the increased cost resulting from the wage increases put into effect at the Secretary's instance, in the course of the petitioner's performance of the original contracts, and that the findings of the Court of Claims show that such further contracts were made and were based upon an adequate consideration, consisting of both advantage to the Government and detriment to the petitioner. The findings on other points are not such as to enable this Court finally to dispose of the case. Accordingly the judgment of the Court of Claims is reversed and the cause is remanded to that Court with directions (1) to make further findings (*a*) as to whether the instruments of release express the actual intention of the parties in respect of a settlement or release of the petitioner's claim for increased cost resulting from putting into effect the increased wages, or whether through mutual mistake, duress, or other sufficient ground for reformation the instruments of release were so drawn and signed that they failed to express the actual intention of the parties in that respect, and (*b*) as to what amount of increased cost to the petitioner resulted from the wage increases as respects work done under the original contracts after the wage increases took effect; (2) to make these findings from the evidence already taken and any additional evidence which the Court of Claims may deem it proper to receive; (3) to allow any amendments of the pleadings which may be needed to present the question whether the instruments of release should be reformed to express the actual intention of the parties in the particular herein named; and (4) to render such judgment in the cause as may be appropriate in view of the amended pleadings and the supplemented findings.

The mandate herein shall issue forthwith. *Messrs. Bynum E. Hinton, George A. King, Wm. B. King* and *George R. Shields* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and

Messrs. Perry W. Howard and *Louis F. Mehlinger* for the United States.

No. —, original. COLORADO *v.* KANSAS. January 3, 1928. The motion for leave to file bill of complaint is granted and process ordered to issue returnable on Monday, February 20, 1928. *Mr. Wm. L. Boatright,* Attorney General of Colorado, for complainant.

PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 3, 1927, TO AND INCLUDING JANUARY 3, 1928.

No. 252. MRS. L. E. WILLIAMS, INDIVIDUALLY AND NATURAL TUTRIX, *v.* GREAT SOUTHERN LUMBER COMPANY. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. J. Waguespack* for petitioner. *Mr. Generes Dufour* for respondent.

No. 258. COMMERCIAL CREDIT COMPANY *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Duane R. Dills* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer* for the United States.

No. 260. CITY OF NEW BRUNSWICK, WILLIAM G. HOWELL, TREASURER OF THE CITY OF NEW BRUNSWICK, ET AL. *v.* UNITED STATES AND UNITED STATES HOUSING CORPORATION. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. John W. Davis* and *Edward L.*

Patterson for petitioners. *Solicitor General Mitchell* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for the United States.

No. 266. ALASKA PACKERS ASSOCIATION *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA AND JOHN PETERSON. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of California granted. *Mr. Allen L. Chickering* for petitioner. *Messrs. H. W. Hutton* and *G. C. Faulkner* for respondents.

No. 269. AILEEN E. MITCHELL ET AL. *v.* J. W. HAMPEL ET AL., TRUSTEES IN BANKRUPTCY. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. T. W. Gregory* for petitioners. *Mr. Lewis R. Bryan* for respondents.

No. 283. UNITED STATES *v.* MAGNOLIA PETROLEUM COMPANY ET AL. October 17, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Alexander H. McCormick* for the United States. *Messrs. George E. Elliott Barry Mohun* and *W. H. Francis* for respondents.

No. 285. HOLLAND FURNITURE COMPANY *v.* PERKINS GLUE COMPANY. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Wm. H. Davis, James A. Watson* and *Charles E. Hughes* for petitioner. *Mr. Gorham Crosby* for respondent.

No. 297. BEATRICE GRAYSON JOHNSON *v.* WRIGHT THORNBURGH, ADMINISTRATOR, ET AL. October 17, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Messrs. C. B. McCrory* and *A. L. Emery* for petitioner. *Messrs. Joseph L. Hull, Nathan A. Gibson* and *James M. Hays* for respondent.

No. 299. ARNOLD J. HELLMICH, COLLECTOR, *v.* ISADORE N. HELLMAN; and

No. 300. ARNOLD J. HELLMICH, COLLECTOR, *v.* MILTON C. HELLMAN. October 17, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Sewall Key* for petitioner. *Mr. Henry H. Furth* for respondents.

No. 321. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* EDGAR M. WRIGHT, GUARDIAN. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Wm. D. Arant* and *Frederick L. Allen* for petitioner. *Messrs. B. P. Crum* and *Richard T. Rives* for respondent.

No. 342. KRAUSS BROTHERS LUMBER COMPANY *v.* ANDREW W. MELLON, DIRECTOR GENERAL, ET AL. October 24, 1927. Petition for writ of certiorari granted, the discussion to be limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn. *Mr. Brenton K. Fisk* for petitioner. *Messrs. Sidney F. Andrews* and *Alexander M. Bull* for respondents.

No. 346. FINKELSTEIN & KOMMEL *v.* UNITED STATES. October 24, 1927. Petition for writ of certiorari granted, and the case set for hearing on November 21 next after the cases heretofore set for that date. *Mr. Frederick W. Brooks, Jr.*, for petitioners. *Solicitor General Mitchell* and *Mr. Cyril S. Lawrence* for the United States.

No. 341. D. B. HEINER, COLLECTOR, *v.* JAMES R. TINDLE AND THE UNION TRUST COMPANY OF PITTSBURGH, CO-EXECUTORS, ETC. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Mitchell* for petitioner. No appearance for respondents.

No. 344. HUBERT WORK, SECRETARY OF THE INTERIOR, *v.* ROBERT L. BRAFFET, ADMINISTRATOR. October 24, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell* and *Messrs. E. O. Patterson* and *O. H. Graves* for petitioner. *Mr. Walter E. Burke* for respondent.

No. 349. THE KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* FRANKLIN JONES, ADMINISTRATOR. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Texas granted. *Messrs. F. H. Moore, J. J. King, J. Q. Mehaffey, A. F. Smith* and *S. W. Moore* for petitioner. *Mr. S. P. Jones* for respondent.

No. 375. MIDLAND VALLEY RAILROAD COMPANY *v.* THOMAS BARKLEY ET AL. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted. *Messrs. Thomas B. Pryor, Vincent M. Miles* and *O. E. Swan* for petitioner. *Mr. Charles I. Evans* for respondents.

No. 376. JOHN J. MITCHELL ET AL., EXECUTORS, *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Milward W. Martin* and *A. L. Humes* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Alexander H. McCormick* for the United States.

No. 384. HOWARD MOORE *v.* CITY OF NAMPA. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. George L. Nye* for petitioner. *Mr. Leon M. Fisk* for respondent.

No. 403. JERRY R. MCCOY *v.* A. S. J. SHAW, STATE AUDITOR, ET AL. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Messrs. Robert M. Rainey* and *Streeter B. Flynn* for petitioner. *Mr. Edwin Dabney* for respondents.

No. 424. EDWARD E. JENKINS, RECEIVER, *v.* NATIONAL SURETY COMPANY. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. E. M. Bagley, John Jensen and Harold M. Stephens* for petitioners. *Messrs. Ray VanCott* and *Bynum E. Hinton* for respondent.

No. 425. MIDLAND NATIONAL BANK OF MINNEAPOLIS *v.* DAKOTA LIFE INSURANCE COMPANY. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Andreas Ueland* for petitioner. *Mr. John B. Hanten* for respondent.

No. 433. CITY OF GAINESVILLE *v.* BROWN-CRUMMER INVESTMENT COMPANY ET AL. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. O. Davis* for petitioner. *Messrs. F. C. Dillard, Rice Maxey, Rhodes S. Baker, H. O. Head* and *James G. Martin* for respondents.

No. 446. CHARLEY HEE, ALIAS DONG BOW HEE, *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Joseph Fairbanks* and *Dan F. Reynolds* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 539. FREDERICK A. COOK *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. H. C. Wade* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. George H. Foster* for the United States.

No. 448. GOON BON JUNE *v.* UNITED STATES. November 21, 1927. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Walter Bates Farr* and *Everett F. Damon* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Luhring* for the United States.

No. 456. FEDERAL INTERMEDIATE CREDIT BANK OF COLUMBIA, SOUTH CAROLINA, *v.* CHAS. S. MITCHELL ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. D. W. Robinson* for petitioner. *Mr. George L. Buist* for respondents.

No. 459. REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE AND ENGINEERING TIMBER COMPANY, LTD. *v.* FRENCH OVERSEAS CORPORATION, AS OWNER OF THE SCHOONER "MALCOLM BAXTER, JR." November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. John M. Woolsey, Mark W. Maclay, Robert S. Erskine* and *Charles K. Carpenter* for petitioners. *Messrs. D. Roger Englar, T. Catesby Jones* and *James W. Ryan* for respondent.

No. 472. SOUTHERN PACIFIC COMPANY *v.* HILDUR HAGLUND, ADMINISTRATRIX, ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Wm. Denman* for petitioner. *Mr. Ira S. Lillick* for respondents.

No. 473. SOUTHERN PACIFIC COMPANY *v.* MOORE SHIPBUILDING COMPANY ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Wm. Denman* for petitioner. *Messrs. Ira S. Lillick* and *J. F. Sullivan* for respondents.

No. 496. THE CARTER OIL COMPANY ET AL. *v.* TAYLOR ELI ET AL. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Messrs. Chester I. Long, George E. Chamberlain, Peter Q. Nyce, James A. Veasey* and *George S. Ramsey* for petitioners. *Messrs. Daniel H. Linebaugh* and *Hall Pinson* for respondents.

No. 500. THOMAS J. CASEY *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John T. Casey* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 510. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., *v.* FIREMAN'S FUND INSURANCE COMPANY;

No. 511. SAME *v.* GLOBE & RUTGERS FIRE INSURANCE COMPANY;

No. 512. SAME *v.* NORTHWESTERN FIRE & MARINE INSURANCE COMPANY;

No. 513. SAME *v.* HARTFORD FIRE INSURANCE COMPANY;

No. 514. SAME *v.* NATIONAL LIBERTY INSURANCE COMPANY;

No. 515. SAME *v.* AETNA INSURANCE COMPANY;

No. 516. SAME *v.* WESTERN ASSURANCE COMPANY;

No. 517. SAME *v.* LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.;

No. 518. SAME *v.* SPRINGFIELD FIRE & MARINE INSURANCE COMPANY;

No. 519. SAME *v.* FRANKLIN FIRE INSURANCE COMPANY; and

No. 520. SAME *v.* PHOENIX INSURANCE COMPANY. November 21, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John D. Grace* for petitioner. *Messrs. T. Catesby Jones, Henry P. Dart, Jr.* and *Robert H. Keeley* for respondents.

No. 534. KARL BUZYNSKI *v.* LUCKENBACH STEAMSHIP CO., INC., ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. James W. Wayman* for petitioner. No appearance for respondents.

No. 538. A. B. CAPLINGER, COUNTY JUDGE, *v.* UNITED STATES ON RELATION OF HARRIMAN NATIONAL BANK. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. A. B. Caplinger, pro se. Messrs. Harvey D. Jacob, Joe T. Robinson, Joe W. House* and *C. H. Moses* for respondent.

No. 551. BOSTON SAND & GRAVEL COMPANY *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Foye M. Murphy* and *John W. Davis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum* and *Mr. J. Frank Staley* for the United States.

No. 561. MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, TRUSTEE, ET AL. *v.* CHICAGO AUDITORIUM ASSOCIATION. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Charles E. Hughes, Homer H. Cooper* and *Samuel Topliff* for petitioners. *Messrs. Walter L. Fisher* and *Wm. C. Boyden* for respondent.

No. 564. MILTON E. SPRINGER, DALMACIO COSTAS, AND ANSELMO HILARIO *v.* THE GOVERNMENT OF THE PHILIPPINE ISLANDS; and

No. 573. GREGORIO AGONCILLO, BALDOMERO ROXAS, AND CATALINO LAVADIA *v.* THE GOVERNMENT OF THE PHILIPPINE ISLANDS. November 21, 1927. Petition for writs of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. José A. Santos, James Rose, Quintin Paredes* and *Claro M. Recto* for petitioners. *Messrs. Wm. C. Rigby* and *Hugh C. Smith* for respondent.

No. 577. STANDARD PIPE LINE COMPANY, INCORPORATED, *v.* MILLER COUNTY HIGHWAY & BRIDGE DISTRICT. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Wm. H. Arnold* and *David C. Arnold* for petitioner. *Mr. Henry Moore, Jr.*, for respondent.

No. 554. ELIZABETH C. TAFT *v.* FRANK K. BOWERS, COLLECTOR; and

No. 575. GILBERT C. GREENWAY, JR., *v.* FRANK K. BOWERS, COLLECTOR. November 21, 1927. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. The Chief Justice took no part in the consideration or decision of the petitions for writs of certiorari in these cases.

Mr. Henry W. Taft for petitioner in No. 554. *Mr. Roger S. Baldwin* for petitioner in No. 575. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Sewall Key* for respondent.

No. 337. THE WILLIAMSPORT WIRE ROPE COMPANY *v.* UNITED STATES. November 28, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Clarence A. Miller* and *James Walton* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 597. MORIMURA, ARAI & CO. *v.* NATHAN TABACK AND LOUIS TABACK, INDIVIDUALLY AND AS COPARTNERS. December 5, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. James D. Carpenter, Jr.*, for petitioners. *Messrs. David H. Bilder* and *Nathan Bilder* for respondents.

No. 603. L. P. LARSON, JR., COMPANY *v.* WM. WRIGLEY, JR., COMPANY. December 5, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. The questions to be reëxamined to be limited to those relating to the deduction of federal income and excess profits taxes from the net profits awarded to the petitioner. *Messrs. Charles H. Aldrich* and *George I. Haight* for petitioners. *Messrs. Isaac Mayer* and *Wallace R. Lane* for respondent.

No. 137. LARKIN *v.* PAUGH. See p. 507.

No. 620. UNITED STATES, AS OWNER OF THE STEAM COLLIER "PROTEUS," *v.* COMMONWEALTH AND DOMINION LINE, LTD., AS OWNER OF THE STEAMSHIP "PORT PHILIP." December 12, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, the discussion to be limited to the question of the allowance of interest on the amount of the recovery, and the consideration thereof to await the decision of this Court in the case of *Boston Sand & Gravel Co.* v. *United States,* No. 551, October term, 1927. *Solicitor General Mitchell, Assistant Attorney General Farnum* and *Mr. J. Frank Staley* for the United States. *Messrs. Allan B. A. Bradley* and *George DeForest Lord* for respondents.

No. 623. CHARLES WARNER COMPANY *v.* INDEPENDENT PIER COMPANY; and

No. 624. CHARLES WARNER COMPANY *v.* STEAMSHIP "GULFTRADE," WHEREOF GULF REFINING COMPANY IS CLAIMANT. January 3, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. J. T. Manning, Jr.,* for petitioner. No appearance for respondents.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED FROM OCTOBER 3, 1927, TO AND INCLUDING JANUARY 3, 1928.

No. 253. B. S. WHEELER AND M. S. GALASSO *v.* GALEN D. PUE. See *ante*, p. 483.

No. 165. HARLIN *v.* GAGE. See p. 484.

No. 347. JOE GENNA *v.* STATE OF LOUISIANA; and

No. 351. MOLTON BRASSEAUX *v.* STATE OF LOUISIANA. On petitions for writs of certiorari to the Supreme Court of the State of Louisiana. October 10, 1927. The motions for leave to proceed further herein *in forma pauperis* are denied for the reason that the Court, upon examination of the unprinted records herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore hereby also denied.

The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. M. G. Adams* for petitioner in No. 347. *Messrs. Molton Brasseaux, pro se,* and *Charles McCoy* for petitioner in No. 351. *Messrs. Percy Saint, John J. Robira* and *E. R. Schowalter* for respondent.

No. 352. EX PARTE FALTIN. On petition for a writ of certiorari to the Supreme Court of the State of Arizona. October 10, 1927. The motion for leave to proceed further herein *in forma pauperis* is denied, for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore hereby also denied.

The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. John W. Ray* for petitioner.

No. 427. J. D. AUSTIN *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 10, 1927. The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied.

The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. J. D. Austin, pro se. Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 549. JOHN B. LEMIEUX ET AL. *v.* AGATE LAND COMPANY AND CITY OF SUPERIOR. On petition for a writ of certiorari to the Supreme Court of the State of Wisconsin. October 10, 1927. The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied.

The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. John B. Arnold* for petitioners. No appearance for respondents.

No. 222. WILLIAM R. VERNER, EXECUTOR, *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. James C. Peacock* and *John W. Townsend* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Alexander H. McCormick* for the United States.

No. 232. JOHN D. CHAPMAN *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Sanford Robinson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Messrs. J. Robert Anderson* and *Charles A. Hendler* for the United States.

No. 236. J. F. McMURRAY *v.* THE CHOCTAW NATION OF INDIANS AND THE CHICKASAW NATION OF INDIANS; and

No. 245. THE CHOCTAW NATION OF INDIANS AND THE CHICKASAW NATION OF INDIANS *v.* J. F. McMURRAY. October 10, 1927. Petitions for writs of certiorari to the Court of Claims denied. *Messrs. George E. Hamilton, John F. McCarron, F. C. Dillard, Ernest E. McInnis* and *Melvin Cornish* for petitioner in No. 236, and respondent in No. 245. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. George T. Stormont* and *W. T. Tucker* for respondents in No. 236 and petitioner in No. 245.

No. 237. ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY *v.* EDNA LaLONE, ADMINISTRATRIX. October 10, 1927. Petition for a writ of certiorari to the St. Louis Court of Appeals, State of Missouri, denied. *Mr. J. L. Howell* for petitioner. *Mr. James T. Blair* for respondent.

No. 238. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* JAMES SWAIN. October 10, 1927. Petition for a writ of certiorari to the St. Louis Court of Appeals, State of Missouri, denied. *Mr. J. L. Howell* for petitioner. *Mr. Mark D. Eagleton* for respondent.

No. 239. JOHN CARUTHERS *v.* HENRY B. HINES AND CAL. T. SCOTT. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. Wm. R. Watkins* for petitioner. No appearance for respondents.

No. 241. APOLINARIA SOLON *v.* THE GOVERNMENT OF THE PHILIPPINE ISLANDS ET AL. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Gregory Cipriani* for petitioner. *Mr. Wm. C. Rigby* for respondents.

No. 243. DETROIT STEEL PRODUCTS COMPANY *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Edwin C. Brandenburg* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 244. REMBRANDT H. PEALE *v.* DWIGHT F. DAVIS, SECRETARY OF WAR, HUBERT WORK, SECRETARY OF THE INTERIOR, WILLIAM M. JARDINE ET AL. October 10, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Patrick H. Loughran* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for respondents.

No. 246. KATIE ROBERTS WILSON *v.* MARGARET JANE ROBINSON ET AL. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Doré* for petitioner. *Mr. George Dysart* for respondents.

No. 247. MINN MARIE WILSON *v.* MARGARET JANE ROBINSON ET AL. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Doré* for petitioner. *Mr. George Dysart* for respondent.

No. 248. SOLOMON LAURISDEN AND HARRY KAMPS *v.* LOUIS H. ALEXANDER AND JOHN DOE ALEXANDER. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Doré* for petitioners. No appearance for respondents.

No. 249. NEW YORK LIFE INSURANCE COMPANY *v.* HENRI M. SLIOSBERG. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. John F. Dulles* for petitioner. *Mr. Walter H. Pollak* for respondent.

No. 250. NEW YORK LIFE INSURANCE COMPANY *v.* HENRI M. SLIOSBERG. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. John F. Dulles* for petitioner. *Mr. Walter H. Pollak* for respondent.

No. 251. A. W. MELLON, DIRECTOR GENERAL *v.* C. B. IVEY AND E. S. ESTES. October 10, 1927. Petition for a

writ of certiorari to the Supreme Court of the State of Florida denied. *Mr. Scott M. Loftin* for petitioner. *Mr. Roswell King* for respondents.

No. 254. BENJAMIN A. LEVY, TRUSTEE, *v.* ANTHONY C. POST. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Walter Hartstone* for petitioner. *Mr. John H. Devine* for respondent.

No. 255. PETER MARTIN *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edward Dinkelspiel* and *Raymond M. Hudson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer* for the United States.

No. 257. ALBERT A. ZINK ET AL. *v.* BLACK STAR LINE AND T. V. O'CONNOR, CHAIRMAN UNITED STATES SHIPPING BOARD, GARNISHEE. October 10, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Reeves T. Strickland* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum* and *Mr. J. Frank Staley* for respondents.

No. 259. ERIE RAILROAD COMPANY *v.* INTERNATIONAL PRODUCTS COMPANY. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Theodore Kiendl, John W. Davis* and *William C. Cannon* for petitioners. *Mr. David Paine* for respondent.

No. 261. THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Thomas Sterling* and *Robert T. Tedrow* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. George T. Stormont* for the United States.

No. 264. SIDNEY C. BORG ET AL., AS A COMMITTEE, *v.* ILLINOIS TERMINAL COMPANY. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Nathan G. Moore, Alfred A. Cook, Charles S. Cutting* and *William P. Sidley* for petitioners. *Mr. H. S. Baker* for respondent.

No. 265. CARRIE HOWARD STEEDMAN AND EUGENIA HOWARD EDMUNDS *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Frank S. Bright* and *L. L. Swarts* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Fred K. Dyar* for the United States.

No. 267. FRED SMITH *v.* UNITED STATES. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan April* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 268. SPRINGFIELD BOILER COMPANY ET AL. *v.* BABCOCK & WILCOX COMPANY. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Fritz Brieson,*

Charles E. Hughes, William A. Redding and *John E. Hubbell* for petitioners. *Messrs. Livingston Gifford* and *Clarence P. Byrnes* for respondent.

No. 270. MISSOURI PACIFIC RAILROAD COMPANY *v.* M. BARRY. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Messrs. R. E. Wiley, Edward J. White,* and *Edgar E. Kinsworthy* for petitioner. *Mr. J. F. Loughborough* for respondent.

No. 278. WONG GAR WAH *v.* WALTER E. CARR, DISTRICT DIRECTOR. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George W. Hott* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 279. CLYDE STEAMSHIP COMPANY *v.* ELIZABETH BEER, ADMINISTRATRIX. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence B. Smith* for petitioner. *Mr. Harold R. Medina* for respondent.

No. 280. NATIONAL BANK SUPPLY COMPANY, INC., *v.* BANKERS UTILITIES COMPANY, INC., AND BUTLER F. GREER. October 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. C. P. Goepel, Charles E. Townsend* and *William A. Loftus* for petitioner. No appearance for respondents.

No. 281. IDA NOLET LIMOGES AND HONORE NOLET *v.* MINNESOTA IRON COMPANY. October 10, 1927. Petition for a writ of certiorari to the Supreme Court of the

State of Minnesota denied. *Messrs. John E. Palmer* and *John B. Arnold* for petitioners. *Messrs. Frank D. Adams* and *Elmer F. Bly* for respondent.

No. 157. UNITED STATES *v.* W. A. MCFARLAND AND J. NORRIS MCFARLAND, COPARTNERS. See *ante*, p. 485.

No. 282. CHARLES B. BREWER *v.* ANDREW W. MELLON. October 17, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Richard L. Merrick* for petitioner. No appearance for respondent.

No. 284. NEALE, INC., ET AL. *v.* HONORABLE PAUL J. MCCORMICK AND EDWARD J. HENNING, JUDGES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Samuel Knight* and *Samuel E. Darby* for petitioners. No appearance for respondents.

No. 286. THE CLEAR VISION PUMP COMPANY *v.* WICHITA VISIBLE GASOLINE PUMP COMPANY ET AL. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wm. F. Hall, Alfred J. O'Brien* and *Hal M. Black* for petitioner. *Messrs. Harry W. Hart* and *Delos G. Haynes* for respondents.

No. 287. PENNSYLVANIA RAILROAD COMPANY *v.* STEAMSHIP "HARVEY H. BROWN," CASTNER, CURRAN & BULLITT, INC. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Mr. W. H. McGrann* for respondents.

No. 289. JACK CAVANA *v.* ADDISON MILLER, INC. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Everett J. Smith* for petitioner. *Mr. J. Kemp Bartlett* for respondent.

No. 290. UNITED STATES EX RELATIONE ELLERY C. STOWELL *v.* WILLIAM C. DEMING, GEORGE R. WALES, AND JESSIE DELL, CIVIL SERVICE COMMISSIONERS. October 17, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Ellery C. Stowell, pro se,* and *Albert H. Putney* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for respondents.

No. 294. BUSINESS MEN'S ASSURANCE COMPANY *v.* DORA A. SCOTT. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Rees Turpin* for petitioner. *Mr. Horace M. Hawkins* for respondent.

No. 295. J. GEORGE WRIGHT, SUPERINTENDENT OSAGE AGENCY, *v.* C. E. ASHBROOK, LEGAL GUARDIAN, ET AL. October 17, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. James M. Humphreys* for petitioner. No appearance for respondents.

No. 298. R. A. JEANNERET *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. E. R. Morrison* and *Lawrence H. Cake* for petitioner. *Messrs. Bruce Scott* and *Kenneth F. Burgess* for respondent.

No. 302. ROBERT L. CROOK AND DANIEL H. CHRISTMAN *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. D. Wilkinson* and *C. H. Lewis* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 303. PAUL VILLERE, TRUSTEE, *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Percy S. Benedict* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, for the United States.

No. 305. MIKE FRITZEL *v.* UNITED STATES; and

No. 306. WILLIAM R. ROTHSTEIN *v.* UNITED STATES. October 17, 1927. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Bernhardt Frank* and *Maclay Hoyne* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 307. UNITED STATES, EX RELATIONE CLINTON M. SEARL, *v.* THOMAS E. ROBERTSON, COMMISSIONER OF PATENTS. October 17, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.,* for petitioner. *Solicitor General Mitchell* for respondent.

No. 308. EUGENE K. PAPE, BY ELSIE WILSON PAPE, GUARDIAN AD LITEM, *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Ninth Circuit denied. *Mr. Overton G. Ellis* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for the United States.

No. 309. WILLIAM L. LITZRODT *v.* THOMAS W. MILLER, ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, TREASURER OF THE UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur G. Hays* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum* and *Mr. Dean H. Stanley* for respondents.

No. 310. CHESTER LA MARE *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John E. Kinnane* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 311. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* MRS. JESSIE B. ADKINS, ADMINISTRATRIX AND INDIVIDUALLY, ET AL. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank Andrews* for petitioners. *Messrs. H. C. Carter* and *Perry J. Lewis* for respondents.

No. 312. ARKANSAS WHOLESALE GROCERS ASSOCIATION, REYNOLDS-DAVIS GROCERY CO., GRIFFIN GROCERY CO., ET AL., *v.* FEDERAL TRADE COMMISSION. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edgar*

Watkins and *Mac Asbill* for petitioners. *Solicitor General Mitchell* and *Messrs. Bayard T. Hainer,* General Counsel, Federal Trade Commission, and *Adrian F. Busick,* Assistant Counsel, Federal Trade Commission, for respondent.

No. 313. CENTRAL NATIONAL BANK SAVINGS AND TRUST COMPANY AND JOSEPH A. KLEIN, TRUSTEE, *v.* THE MURPHY HOTELS CORPORATION. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. D. J. Needham* and *Austin V. Cannon* for petitioners. *Mr. Thomas H. Hogsett* for respondent.

No. 314. ANGOLA TRANSFER COMPANY *v.* THE TEXAS & PACIFIC RAILWAY COMPANY. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* for petitioner. No appearance for respondent.

No. 315. S. A. SWANSON *v.* LUCKENBACH STEAMSHIP CO., INC. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur I. Moulton* for petitioner. No appearance for respondent.

No. 316. ROBERT B. ARMSTRONG AND JOHN M. PARKER *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wm. C. Bachelder, A. J. Groesbeck* and *Harold K. Bachelder* for petitioners. *Solicitor General Mitchell, Assistant to the Attorney General Donovan* and *Mr. H. R. Lamb* for the United States.

No. 317. EDGAR DAY *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wm. C. Bachelder, A. J. Groesbeck* and *Harold K. Bachelder* for petitioner. *Solicitor General Mitchell, Assistant to the Attorney General Donovan* and *Mr. H. R. Lamb* for the United States.

No. 318. GRACE A. LEATHE *v.* TITLE GUARANTY TRUST COMPANY. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. S. Mayner Wallace* and *Henry S. Priest* for petitioner. *Messrs. Xenophon P. Wilfley, Fred L. Williams* and *Earl F. Nelson* for respondent.

No. 320. ALEXANDRIA PAPER COMPANY *v.* EIBEL PROCESS COMPANY. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arthur M. Hood* for petitioner. *Mr. Harrison F. Lyman* for respondent.

No. 323. SIMON P. LESSELYOUNG *v.* UNITED STATES. October 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John T. Sullivan* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 324. OTTO C. KURTZ, ADMINISTRATOR, *v.* DETROIT, TOLEDO & IRONTON RAILROAD COMPANY. October 17, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Herbert P. Whitney* for petitioner. *Messrs. Clifford B. Longley* and *Wallace R. Middleton* for respondent.

No. 325. JOHN L. LEWIS, PRESIDENT OF THE UNITED MINE WORKERS OF AMERICA, ET AL. *v.* RED JACKET CONSOLIDATED COAL AND COKE COMPANY;

No. 326. THE INTERNATIONAL ORGANIZATION OF THE UNITED MINE WORKERS OF AMERICA ET AL. *v.* BORDERLAND COAL CORPORATION ET AL.;

No. 327. SAME *v.* ALPHA POCAHONTAS COAL COMPANY ET AL.;

No. 328. SAME *v.* AETNAE SEWELL SMOKELESS COAL COMPANY ET AL.;

No. 329. SAME *v.* DRY BRANCH COAL COMPANY ET AL.;

No. 330. SAME *v.* NELSON FUEL COMPANY ET AL.;

No. 331. SAME *v.* LEEVALE COAL COMPANY AND HOPKINS FORK COAL COMPANY;

No. 332. SAME *v.* SENG CREEK COAL COMPANY AND MORDUE COLLIERIES COMPANY;

No. 333. SAME *v.* RALEIGH-WYOMING COAL COMPANY, HAZY EAGLE COLLIERIES COMPANY ET AL.;

No. 334. SAME *v.* ANCHOR COAL COMPANY ET AL.;

No. 335. SAME *v.* STERLING BLOCK COAL COMPANY ET AL.; and

No. 336. SAME *v.* CARBON FUEL COMPANY ET AL. October 17, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wm. A. Glasgow, Jr.*, and *Henry Warrum* for petitioners. *Messrs. Edgar L. Greever, Albert M. Belcher* and *Robert S. Spilman* for respondents.

No. 338. GEORGE T. SHAW *v.* C. A. OWENS. October 17, 1927. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. F. W. Clements, Lawrence H. Cake* and *Sidney L. Herold* for petitioner. *Mr. Frank J. Looney* for respondent.

No. 378. UNITED STATES, USE OF UNION GAS ENGINE COMPANY, *v.* NEWPORT SHIPBUILDING CORPORATION, LIMITED; NATIONAL SURETY COMPANY. See *post*, p. 575.

No. 381. WELDON J. BAILEY *v.* STATE OF ARIZONA ON RELATION OF JOHN W. MURPHY, ATTORNEY GENERAL. See *post*, p. 575.

No. 586. LULU MIGNON MURPHY *v.* EUGENIE R. BIRD, ADMINISTRATRIX, ET AL. See *ante*, p. 487.

No. 32. JENNIE M. BLAIR, NEE ADAIR, *v.* SAM F. WILKERSON ET AL. See *ante*, p. 488.

No. 20. THOMAS W. PHILLIPS, JR., ET AL., SUBSTITUTED FOR OKLAHOMA NATURAL GAS COMPANY, A CORPORATION, *v.* OKLAHOMA. See *ante*, p. 489.

Nos. 21–27. STATE OF MISSOURI, ON THE RELATIONS OF WASHINGTON UNIVERSITY ET ALS., *v.* PUBLIC SERVICE COMMISSION OF MISSOURI AND UNION ELECTRIC LIGHT & POWER COMPANY. See *ante*, p. 489.

No. 46. THOMAS H. DENT, ADMINISTRATOR, *v.* JAMES S. SWILLEY. See *ante*, p. 492.

No. 54. A. W. MELLON, DIRECTOR GENERAL, *v.* L. E. MCKINLEY. See *ante*, p. 492.

No. 59. GEORGE D. IVERSON, JR. *v.* ILLINOIS GLASS COMPANY. See *ante*, p. 493.

No. 339. MINNIE E. PATTERSON, ADMINISTRATRIX, *v.* NEW YORK CENTRAL RAILROAD COMPANY, SUED AS NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Walter A. Fullerton* for petitioner. *Mr. Sherman A. Murphy* for respondent.

No. 340. CHARLES ERWIN BROWN *v.* PERE MARQUETTE RAILWAY COMPANY. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Riley L. Crane* for petitioner. *Messrs. John C. Shields, George W. Weadock* and *Vincent Weadock* for respondent.

No. 345. FRANK DANE *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wilton J. Lambert, Rudolph H. Yeatman* and *Austin F. Canfield* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 348. A. LAWRENCE MILLS AND JOHN R. GRAY *v.* CHARLES T. SHERMAN ET AL., TRUSTEES. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. G. L. Wire* for petitioners. *Mr. Thomas G. Long* for respondents.

No. 350. RITCHIE L. DUNN, TRUSTEE, *v.* SHELL COMPANY OF CALIFORNIA. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Ninth Circuit denied. *Mr. Clarence A. Shuey* for petitioner. *Mr. Edward J. McCutchen* for respondent.

No. 353. GEORGE WESTCOTT STEARN ET AL. *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. T. F. Railsback* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 354. GUILLERMO SEVERINO AND PETRA ABSALON *v.* EL HOGAR FILIPINO, SOCIEDAD MUTUA DE CONSTRUCCION Y PRESTAMOS. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Wm. J. Rohde* and *Robert W. Jennings* for petitioners. *Messrs. Clyde A. DeWitt* and *Eugene A. Perkins* for respondent.

No. 355. GERVASIO MIRAFLORES AND JOSÉ MIRAFLORES *v.* EL HOGAR FILIPINO, SOCIEDAD MUTUA DE CONSTRUCCION Y PRESTAMOS. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Wm. J. Rohde* and *Robert W. Jennings* for petitioners. *Messrs. Clyde A. DeWitt* and *Eugene A. Perkins* for respondent.

No. 356. JOSEPH S. WILLIAMS ET AL. *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Philip Rubenstein* and *David A. Ellis* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 357. THE GULF AND SHIP ISLAND RAILROAD COMPANY *v.* MRS. RUBIE CURTIS, ADMINISTRATRIX. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Messrs. T. J. Wills* and *R. V. Fletcher* for petitioner. *Mrs. Rubie Curtis, pro se.*

No. 358. W. L. BROWN, ADMINISTRATOR, *v.* NORFOLK AND WESTERN RAILWAY COMPANY. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Wm. H. Werth* for petitioner. No appearance for respondent.

No. 359. GEORGE D. EMERY AND INSURANCE COMPANY OF NORTH AMERICA *v.* OVE LANGE, TRUSTEE. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Oscar R. Houston* and *D. Roger Englar* for petitioners. No appearance for respondent.

No. 360. GOODYEAR TIRE & RUBBER COMPANY *v.* JUAN G. GALLARDO, TREASURER. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Nelson Gammans* and *Francis G. Caffey* for petitioner. *Messrs. Wm. C. Rigby* and *George C. Butte* for respondent.

No. 361. W. T. IRWIN ET AL. *v.* THE MISSOURI VALLEY BRIDGE & IRON CO. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Kemper K. Knapp, John R. Cochran, Frank E. Tyler* and *Joseph A. O'Donnell* for petitioners. *Messrs. Lee Bond* and *Fred B. Silsbee* for respondent. See p. 572.

No. 362. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. F. W. Clements* and *Lawrence H. Cake* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Lisle A. Smith* for the United States.

No. 363. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. F. W. Clements* and *Lawrence H. Cake* for Petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Louis R. Mehlinger* for the United States.

No. 367. THE PEOPLE OF THE STATE OF ILLINOIS, OSCAR E. CARLSTROM, ATTORNEY GENERAL, AND JOHN C. FISHER, ET AL. *v.* ILLINOIS CENTRAL RAILROAD COMPANY AND SOUTHERN ILLINOIS AND KENTUCKY RAILROAD COMPANY. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Messrs. Harry E. Kelly* and *Oscar E. Carlstrom,* Attorney General of Illinois, for petitioners. *Messrs. Walter S. Horton, Edward C. Craig* and *Robert V. Fletcher* for respondents.

No. 368. AETNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *v.* LICKING VALLEY MILLING COMPANY. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph V. Laurent* for petitioner. *Mr. S. D. Rouse* for respondent.

No. 369. GEORGE E. TRUMAN, COUNTY TREASURER, J. C. CALLAGHAN, TREASURER, ET AL. *v.* WALTER J. THALHEIMER, TRUSTEE. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John W. Murphy* and *Earl Anderson* for petitioners. *Mr. Henderson Stockton* for respondent.

No. 371. ATLANTIC LIGHTERAGE CORPORATION *v.* ERNEST SODERBERG, MANAGING OWNER OF THE BARGE ALERT, AND CUNARD STEAMSHIP COMPANY, LTD. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Pierre M. Brown* and *Horace L. Cheyney* for petitioner. *Mr. George DeForest Lord* for respondent.

No. 372. WILLIAM McCULLY *v.* MONONGAHELA RAILROAD COMPANY. October 24, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. William McCully, pro se. Messrs. Frederic D. McKenney, John S. Flannery,* and *Robert D. Dalzell* for respondent.

No. 373. FRANKLIN COUNTY, ARKANSAS, *v.* HARRIMAN NATIONAL BANK; and

No. 374. FRANKLIN COUNTY, ARKANSAS, *v.* SULLIVAN COUNTY NATIONAL BANK. October 24, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas B. Pryor* and *Vincent M. Miles* for petitioner. No appearance for respondents.

No. 377. M. B. SIEGEL, INC. *v.* CITY OF CHICAGO. October 24, 1927. Petition for a writ of certiorari to

the Supreme Court of the State of Illinois denied. *Mr. Elmer M. Leesman* for petitioner. *Messrs. James W. Breen, Samuel A. Ettelson, Edgar B. Tolman* and *Wm. H. Sexton* for respondent.

No. 379. MONTY MORRIS *v.* UNITED STATES. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James P. Gilmore* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer* for the United States.

No. 380. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* CARL F. LEVERENTZ, ADMINISTRATOR. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. F. W. Root* and *A. C. Erdall* for petitioner. *Mr. Montreville J. Brown* for respondent.

No. 382. SOUTHERN PACIFIC COMPANY *v.* DEL KALBAUGH AND JAMES MOXLEY. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank Thunen* and *C. F. R. Ogilby* for petitioner. *Mr. James Moxley* for respondents.

No. 385. GRAFF FURNACE COMPANY *v.* HANS MACHLER. October 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Jerry A. Matthews* and *Philip V. Mattes* for petitioner. No appearance for respondent.

No. 36. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY *v.* TEXAS. See *ante*, p. 494.

No. 72. FORDSON COAL COMPANY *v.* JOHN M. MOORE, SHERIFF. See *ante*, p. 494.

No. 386. RUBY STEAMSHIP CORPORATION, LTD. *v.* JOHNSON & HIGGINS. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward F. Treadwell* for petitioner. *Messrs. Cletus Keating* and *Ira A. Campbell* for respondents.

No. 389. WILLIAM R. GEORGE *v.* IDAHO. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Idaho denied. *Messrs. Charles J. Williamson* and *Turner K. Hackman* for petitioner. *Mr. Leon N. Fisk* for respondent.

No. 390. CHARLOTTE F. JONES *v.* THE COUNTIES GAS AND ELECTRIC COMPANY. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Charlotte F. Jones, pro se.* No appearance for respondent.

No. 393. THE LEHIGH AND HUDSON RIVER RAILWAY COMPANY *v.* JOHN H. HUBBARD. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Herbert A. Taylor* for petitioner. No appearance for respondent.

No. 395. CHARLES W. BOSTROM ET AL. *v.* CUYAMEL FRUIT COMPANY, CLAIMANT AND OWNER OF STEAMSHIP "NICARAO," ET AL. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* for petitioners. No appearance for respondents.

No. 396. GEORGE F. WILLETT ET AL. *v.* ROBERT F. HERRICK ET AL. October 31, 1927. Petition for a writ of certiorari to the Superior Court for the County of Norfolk, State of Massachusetts, denied. *Messrs. Sherman L. Whipple, Joseph Wiggin* and *Boyd B. Jones* for petitioners. *Messrs. Thomas Hunt, Malcolm Donald, Lowell A. Mayberry, George L. Mayberry, Hugh D. McLellan, John T. Noonan* and *Robert Cutler* for respondents.

No. 397. UNION BANK AND TRUST COMPANY OF HELENA, MONTANA, *v.* LESTER H. LOBLE, TRUSTEE. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. M. S. Gunn* for petitioner. *Mr. H. G. McIntire* for respondent.

No. 398. JACOB WOITTE ET AL. *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. C. Faulkner* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 402. JOSEPHINE H. PLANE *v.* WALTER E. CARR, DISTRICT DIRECTOR OF IMMIGRATION. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Roger O'Donnell* and *J. Edward Keating* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for respondent.

No. 405. FRED LUDWIG, ALFRED A. GOTSHALL, AND LELAND L. MORRIS, PARTNERS, *v.* W. S. RAYDURE, A PARTNERSHIP, ET AL. October 31, 1927. Petition for a writ

of certiorari to the Court of Appeals of Lucas County, State of Ohio, denied. *Messrs. Albert H. Miller* and *Charles H. Brady* for petitioners. *Mr. Frank A. Baldwin* for respondents.

No. 406. PITTSBURGH HOTELS COMPANY *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. George R. Beneman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Alexander H. McCormick* for the United States.

No. 419. FRANK P. BLAIR *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. James W. Good, James B. Wescott* and *W. Warfield Ross* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Fred K. Dyar* for the United States.

No. 420. GLOBE INDEMNITY COMPANY OF NEW YORK *v.* COUNTY OF SCOTTS BLUFF, NEBRASKA, ET AL. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Messrs. Matthew A. Hall, Raymond G. Young* and *Harvey M. Johnsen* for petitioner. No appearance for respondent.

No. 421. LOUIS SCHRIJVER, ADOLPH KRIJN, AND LEHMAN RUDOLPH KRIJN, COPARTNERS, *v.* HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN. October 31, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Sidney P. Simpson, Goldthwaite H. Dorr* and *Robert F. Cogswell* for

petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum* and *Mr. Dean H. Stanley* for respondent.

No. 422. MODERN WORKMEN OF THE WORLD ET AL. *v.* CHARLES A. HARTMANN ET AL. October 31, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. W. Bissell Thomas, Walter H. Newton* and *J. K. M. Norton* for petitioners. No appearance for respondents.

No. 423. STOCK YARDS LOAN COMPANY *v.* COMMERCIAL NATIONAL BANK OF INDEPENDENCE, KANSAS. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry M. Ward, Henry L. McCune* and *David A. Murphy* for petitioner. *Mr. Charles W. German* for respondent.

No. 426. SAMUEL M. HASTINGS, ADMINISTRATOR, *v.* NINA K. JONES, EXECUTRIX. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Kemper K. Knapp* and *John R. Cochran* for petitioner. *Messrs. Caruthers Ewing* and *Thomas F. Howe* for respondent.

No.428. MORTON E. CONVERSE & SON COMPANY *v.* H. C. WHITE COMPANY. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm. F. Hall* and *Thomas G. Haight* for petitioner. *Mr. James J. Kennedy* for respondent.

No. 429. ARKANSAS & MEMPHIS RAILWAY BRIDGE & TERMINAL COMPANY *v.* ARKANSAS EX REL. ATTORNEY GENERAL. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. J. W. Canada* for petitioner. *Messrs. H. W. Applegate, Joe T. Robinson, J. W. House* and *C. H. Moses* for respondent.

No. 432. OIL FIELDS CORPORATION *v.* JOHN S. DASHKO, ET AL. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Albert L. Wilson* for petitioner. *Mr. J. K. Mahony* for respondents.

No. 434. C. W. BASSETT ET AL. *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Sardis Summerfield* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 435. R. C. CLAPP *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Robert C. Faulston* and *Arthur V. Roberts* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 436. MASSACHUSETTS BONDING AND INSURANCE COMPANY *v.* NATIONAL SURETY COMPANY. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert C. Smyth* for petitioner. *Messrs. Louis Marshall* and *James Marshall* for respondent.

No. 438. BARNEY PEARLMAN *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Hall S. Lusk* and *Barney Pearlman, pro se,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Lawrence J. Kosters* for the United States.

No. 439. THE HANNA STOKER COMPANY *v.* LOCOMOTIVE STOKER COMPANY. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Walter F. Murray, Drury W. Cooper* and *J. Snowden Bell* for petitioner. *Mr. Paul Synnestvedt* for respondent.

No. 440. PHILIPPINE NATIONAL BANK *v.* AMERICAN SURETY COMPANY OF NEW YORK. October 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. John T. Loughran* for petitioner. *Mr. Allan C. Rowe* for respondent.

No. 441. GREEN-MOORE & CO., INC., ET AL. *v.* UNITED STATES. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles A. McCoy* and *G. T. Hawkins* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Parmenter* and *Mr. Perry G. Michener* for the United States.

No. 442. O. K. MANUFACTURING COMPANY *v.* BASSICK MANUFACTURING COMPANY; and

No. 443. LARKIN AUTOMOTIVE PARTS COMPANY *v.* BASSICK MANUFACTURING COMPANY. October 31, 1927.

Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Alfred M. Allen* and *W. B. Turner* for petitioners. *Mr. Lynn A. Williams* for respondent.

No. 444. MAURICE KAY AND BENJAMIN KAY *v.* EDGAR C. SNYDER, UNITED STATES MARSHAL. October 31, 1927. Petitioner for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. J. S. Easby-Smith, David A. Pine, A. L. Newmyer* and *Milton W. King* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for respondent.

No. 445. NORWEGIAN AMERICAN SECURITIES CORPORATION *v.* HENRY H. KAUFMAN, TRUSTEE. October 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roscoe H. Hupper* for petitioner. *Mr. Ralph F. Colin* for respondent.

No. 447. ROBERT H. ALDREDGE *v.* BALTIMORE & OHIO RAILROAD COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. H. Douglass* for petitioner. *Mr. Douglas W. Robert* for respondent.

No. 450. TRIBOND SALES CORPORATION *v.* HARRY S. NEW, POSTMASTER GENERAL. November 21, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. E. F. Colladay* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for respondent.

No. 451. SARAH MARCUS GREENBERG *v.* THE PENNSYLVANIA TRUST COMPANY OF PITTSBURGH, TRUSTEE. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lourie C. Barton* for petitioner. *Mr. Thomas M. Benner* for respondent.

No. 452. MISSOURI PACIFIC RAILROAD COMPANY *v.* JAMES M. RUSSELL. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Edward J. White* and *James F. Green* for petitioner. *Mr. Charles E. Morrow* for respondent.

No. 457. AMERICAN EXCHANGE IRVING TRUST COMPANY *v.* LEON BONNASSE ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Oscar R. Houston* and *D. Roger Englar* for petitioner. *Mr. Homer L. Loomis* for respondents.

No. 458. PATRICK A. MCDONNELL *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. LaRue Brown* and *Wm. B. Sullivan* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer* for the United States.

No. 460. ELMER C. DYER ET AL. *v.* GEORGE A. STAUFFER, MARSHAL, ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. U. G. Denman* and *Her-*

bert W. Nauts for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Sewall Key* for respondents.

No. 461. CHIMNEY ROCK COMPANY *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 462. THE NEW BRITAIN MACHINE COMPANY *v.* EMMA CONE. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Murray Seasongood* for petitioner. *Mr. Frank F. Dinsmore* for respondent.

No. 466. THE CITY OF NEW YORK *v.* THE NEW YORK CENTRAL RAILROAD COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George P. Nicholson* for petitioner. *Mr. T. Catebsy Jones* for respondent.

No. 469. RIVERSIDE OIL & REFINING COMPANY *v.* CIMARRON RIVER OIL COMPANY ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. C. M. Oakes* and *Thomas D. Lyons* for petitioner. *Messrs. John J. Shea, H. M. Gray, Anthony P. Nugent, Wesley E. Disney* and *C. F. Newman* for respondents.

No. 470. MISSOURI PACIFIC RAILROAD COMPANY *v.* MARTIN WOODWARD. November 21, 1927. Petition for a

writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Thomas Hackney, Leslie A. Welch* and *Edward J. White* for petitioner. *Mr. Wm. S. Hogsett* for respondent.

No. 474. PEOPLES TRANSIT COMPANY *v.* GEORGE A. HENSHAW ET AL., RECEIVERS. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren K. Snyder* for petitioner. *Mr. John B. Dudley* for respondents.

No. 475. PERE MARQUETTE RAILROAD COMPANY *v.* FRANK FARRELLI. November 21, 1927. Petition for a writ of certiorari to the Appellate Court of the State of Illinois, First District, denied. *Mr. Sidney C. Murray* for petitioner. *Mr. Herbert H. Patterson* for respondent.

No. 476. ALFRED LEEB AND LOUIS NOVA, COPARTNERS, *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm. E. Russell* and *Benjamin A. Levitt* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 477. OLD HONESTY OIL COMPANY *v.* CLARA B. SHULER. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Finis E. Riddle* for petitioner. *Mr. Randolph Shirk* for respondent.

No. 478. VAN DUSEN HARRINGTON COMPANY *v.* ILLINOIS CENTRAL RAILROAD COMPANY. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Albert C. Remele* for petitioner. *Mr. Asa G. Briggs* for respondent.

No. 479. JAMES R. CATON ET AL. *v.* MICHIGAN SANITARIUM AND BENEVOLENT ASSOCIATION ET AL. November 21, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill, Henry C. Clark, George V. Triplett, Jr., W. C. Sullivan* and *Roger J. Whiteford* for petitioners. *Messrs. Frank J. Hogan, Stanton C. Peelle, Dale D. Drain* and *Wm. H. Donovan* for respondents.

No. 480. JOE PARENTE AND ARMANDO BONACORSI *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert B. McMillan* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 481. JOSEPH J. WEINHANDLER *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Stuart G. Gibboney* and *David V. Cahill* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 482. GLENDOLA STEAMSHIP CORPORATION *v.* STANDARD OIL COMPANY (N. J.). November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals

for the Second Circuit denied. *Messrs. Sanford H. E. Freund* and *Horace M. Gray* for petitioner. *Mr. W. H. McGrann* for respondent.

No. 483. CENTRAL UNION TRUST COMPANY OF NEW YORK ET AL. *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. John M. Perry* and *John W Drye, Jr.*, for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Fred K. Dyar* for the United States.

No. 484. CORNELL STEAMBOAT COMPANY *v.* STATE INDUSTRIAL BOARD AND IDA C. BENSON, WIDOW. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Harry H. Flemming* for petitioner. No appearance for respondents.

No. 485. BOSTON INSURANCE COMPANY *v.* JOHN S. SORENSON AND T. B. S. NIELSEN, COPARTNERS, ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George W. P. Whip* for petitioner. *Messrs. Frank B. Ober* and *D. Roger Englar* for respondents.

No. 486. UNITED STATES *v.* W. N. HAYES ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for the United States. *Mr. John J. Shea* for respondents.

No. 487. UNITED STATES *v.* CIMARRON RIVER OIL COMPANY ET AL. November 21, 1927. Petition for a writ of

certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Mitchell* for the United States. *Messrs. C. B. Ames, H. M. Gray, John J. Shea, Anthony P. Nugent, Wesley E. Disney, C. F. Newman* and *James C. Davis* for respondents.

No. 488. LOUISA C. AICHNER *v.* COMMONWEALTH CASUALTY COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lambert E. Walther, John S. Leahy* and *Walter H. Saunders* for petitioner. No appearance for respondent.

No. 489. REEVES COAL AND DOCK COMPANY, E. T. MCDONALD, RECEIVER, *v.* GEORGE E. GEDDES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. M. H. Boutelle* and *A. E. Boyesen* for petitioners. *Mr. Harold G. Simpson* for respondent.

No. 491. CAMP MANUFACTURING COMPANY *v.* S. LILES MILLER, ADMINISTRATOR. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. C. B. Garnett* for petitioner. *Mr. D. W. Robinson* for respondent.

No. 492. UNION FREIGHT RAILROAD COMPANY *v.* BATCHELDER & SNYDER COMPANY. November 21, 1927. Petition for a writ of certiorari to the Superior Court of Suffolk County, State of Massachusetts, denied. *Mr. Arthur W. Blackman* for petitioner. No appearance for respondent.

No. 493. ROY OLMSTEAD ET AL. *v.* UNITED STATES; No. 532. CHARLES S. GREEN ET AL. *v.* UNITED STATES; and No. 533. EDWARD H. MCINNIS *v.* UNITED STATES. November 21, 1927. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John F. Doré* and *Frank R. Jeffery* for petitioners in Nos. 493 and 533. *Mr. Arthur E. Griffin* for petitioners in No. 532. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 494. E. E. EASTON *v.* SUSAN T. BRANT ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. H. Wylie* for petitioner. *Messrs. H. W. O'Melveny* and *Walter K. Tuller* for respondents.

No. 495. CLINCHFIELD RAILROAD COMPANY *v.* ELICE H. DUNN, ADMINISTRATRIX. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James J. McLaughlin* and *John W. Price* for petitioner. *Mr. Robert Burrow* for respondent.

No. 498. KERR STEAMSHIP CO., INC. *v.* RADIO CORPORATION OF AMERICA. November 21, 1927. Petition for a writ of certiorari to the Court of Appeals of the State of New York denied. *Mr. Elkan Turk* for petitioner. *Mr. Peter F. McAllister* for respondent.

No. 499. JOHN PLEICH, SR. *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Messrs. John Pleich, Sr., pro se, and *Jay Good* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer* for the United States.

No. 502. LEWIS G. NORTON *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles R. Pierce* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter* and *Mr. Edward T. Burke* for the United States.

No. 503. WOLF MINERAL PROCESS CORPORATION *v.* MINERALS SEPARATION NORTH AMERICAN CORPORATION. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Henry W. Anderson* and *Wm. A. Chadbourne* for petitioner. *Messrs. Charles McH. Howard, Henry D. Williams, Wm. H. Kenyon* and *Lindley M. Garrison* for respondent.

No. 504. WEHR COMPANY *v.* ROY J. WINSOR. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George L. Wilkinson* for petitioner. *Mr. Theodore K. Bryant* for respondent.

No. 506. CZARNIKOW-RIONDA COMPANY *v.* WEST MARKET GROCERY COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Garrard Glenn* for petitioner. *Mr. Ralph Merriam* for respondent.

No. 507. ARTHUR RICH *v.* MICHIGAN. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Messrs. Harry E. Kelly, Thornton M. Pratt* and *Richard S. Doyle* for petitioner. *Messrs. Wm. W. Potter* and *Wilbur M. Brucker* for respondent.

No. 508. AMERICAN RAILWAY EXPRESS COMPANY *v.* TERRY PACKING COMPANY. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Messrs. Charles W. Stockton, J. Nelson Frierson* and *Branch P. Kerfoot* for petitioner. *Mr. Edward L. Craig* for respondent.

No. 522. WILLIAM H. WOHLSTATTER, NEXT FRIEND OF JEW LEE, *v.* A. W. BROUGH, CHINESE INSPECTOR. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter B. Farr* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for respondent.

No. 523. STAR BALL PLAYER COMPANY *v.* THE PLAYOGRAPH COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas J. Johnston, J. Granville Meyers* and *Charles S. Jones* for petitioner. *Messrs. Joseph H. Milans* and *Calvin F. Milans* for respondent.

No. 524. ERNEST WILTSEE ET AL., RECEIVERS, *v.* FRANCIS R. HART ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Cir-

cuit denied. *Messrs. Francis Kohlman, Sherman L. Whipple* and *Arthur D. Hill* for petitioners. *Messrs. Charles F. Choate, Jr.*, and *Nathan Matthews* for respondents.

No. 525. LUCINDA HALDEMAN, ADMINISTRATRIX, *v.* READING COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles A. Ludlow* for petitioner. *Mr. Edward L. Katzenbach* for respondent.

No. 526. MICHAEL F. LOUGHMAN, PRESIDENT OF THE STATE TAX COMMISSION, AND JOHN J. MERRILL ET AL., STATE TAX COMMISSIONERS, *v.* MARTHA J. SMITH, EXECUTRIX. November 21. 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Albert Ottinger,* Attorney General of New York, for petitioners. *Mr. John L. McMaster* for respondents.

No. 527. LENA KAHLSTROM, ADMINISTRATRIX, *v.* INTERNATIONAL STEVEDORING COMPANY. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Arthur E. Griffin* for petitioner. *Messrs. Stephen V. Carey* and *Alfred J. Schweppe* for respondent.

No. 528. FORDSON COAL COMPANY *v.* WILEY SPURLOCK ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Wallace R. Middleton, Clifford B. Longley,* and *Cleon K. Calvert* for petitioner. *Mr. Charles H. Morris* for respondents.

No. 529. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* WORLD PUBLISHING COMPANY;

No. 530. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* TULSA PAPER COMPANY; and

No. 531. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* DEMOCRAT PRINTING COMPANY. November 21, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Alexander M. Bull* and *Sidney F. Andrews* for petitioner. *Messrs. Karl K. Gartner* and *James A. Shea* for respondents.

No. 535. JEROME G. FARQUHAR *v.* WILLIAM M. HENDERSON AND PLYMOUTH OIL COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis, H. D. Rummel, John S. Weller, Wm. A. Glasgow, Jr.,* and *Thomas J. Walsh* for petitioner. *Messrs. Owen J. Roberts, Charles M. Thorp* and *Earl F. Greed* for respondents.

No. 536. FRANCIS J. MCDONALD *v.* ALBERT T. ROSASCO. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Roscoe H. Hupper, Howard M. Long* and *Wm. J. Dean* for petitioner. *Mr. Homer L. Loomis* for respondent.

No. 537. MUNSON STEAMSHIP LINE *v.* DAMPSKIBS AKTIESELSKABET JEANETTE SKINNER, OWNER OF THE NORWEGIAN STEAMSHIP "JOHN PEAKKE." November 21, 1927. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Mark W. Maclay* and *Frank A. Bernero* for petitioner. *Messrs. John W. Griffin* and *Herbert K. Stockton* for respondent.

No. 540. McCORMICK INTERCOASTAL STEAMSHIP COMPANY ET AL. *v.* YAMASHITA KISEN KABUSHIKI KAISHA ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ira S. Lillick* for petitioners. *Messrs. W. H. Hayden* and *Lane Summers* for respondents.

No. 541. BACHUS-BROOKS COMPANY *v.* NORTHERN PACIFIC RAILWAY COMPANY ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Ralph Whalen, Thomas L. Philips* and *John Junell* for petitioner. *Messrs. Thomas D. O'Brien, Charles Bunn* and *Edward S. Stringer* for respondents.

No. 542. JOHN D. KEY, IN HIS OWN BEHALF AND AS GUARDIAN AD LITEM, ET AL. *v.* PANAMA RAILROAD COMPANY. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Chauncey P. Fairman* and *Charles Kerr* for petitioners. *Mr. John O. Collins* for respondent.

No. 544. MORGAN & BIRD GRAVEL COMPANY, INC. *v.* M. T. WALKER ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. S. L. Herold, C. Huffman Lewis* and *J. D. Wilkinson* for petitioner. No appearance for respondents.

No. 545. GUARANTY TRUST COMPANY OF NEW YORK *v.* G. F. GROHE-HENRICH & Co. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Second Circuit denied. *Messrs. John W. Davis, Wm. C. Cannon* and *Theodore Kiendl* for petitioner. *Messrs. Henry G. Hotchkiss* and *Wm. H. White, Jr,.* for respondent.

No. 546. NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY *v.* WILLIAM M. FILKINS, TRUSTEE; and

No. 547. THE YORKSHIRE INSURANCE COMPANY, LIMITED, *v.* SAME. November 21, 1927. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abner Siegal* for petitioners. *Mr. Harry E. Newell* for respondent.

No. 550. TUCKER BARNETT ET AL. *v.* PRAIRIE OIL & GAS COMPANY ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lewis C. Lawson* for petitioners. *Messrs A. A. Davidson* and *T. J. Flannelly* for respondents.

No. 553. OLD COLONY TRUST COMPANY ET AL., EXECUTORS, *v.* JOHN F. MALLEY, FORMER COLLECTOR, ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. O. Walker Taylor, Frank W. Gunnell, George L. Shearer* and *Robert C. Shilley* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for respondent.

No. 555. LEVI LURIE *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Henry C. Walters, Arthur P. Hicks* and *Cashan P. Head*

for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 556. GARFIELD A. STREET *v.* EMILY M. STUBBLEFIELD, EXECUTRIX. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles H. Merillat* for petitioner. *Messrs. E. C. Brandenburg, C. A. Brandenburg* and *Louis M. Denit* for respondents.

No. 557. ARTHUR L. BISBEE ET AL. *v.* MIDLAND LINSEED PRODUCTS COMPANY ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. V. Mercer* for petitioners. *Mr. John Junell* for respondents.

No. 560. AUTO MOTIVE EQUIPMENT COMPANY ET AL. *v.* THE CONNECTICUT TELEPHONE & ELECTRIC COMPANY, INCORPORATED. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wylie C. Margeson* and *Wm. H. Davis* for petitioners. *Mr. George H. Mitchell* for respondent.

No. 562. LEON KANNER ET AL. *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leon Kanner, pro se,* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 565. NATHAN BARD *v.* JOHN B. CHILTON, WARDEN, ET AL.; and

No. 566. BUNYAN FLEMING *v.* JOHN B. CHILTON, WARDEN, ET AL. November 21, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sinclair M. Russell* for petitioners. *Mr. Andrew T. Smith* for respondents.

No. 567. THEODORE DAVIS BOAL, EXECUTOR, AND KATE ATWOOD, INDIVIDUALLY, *v.* METROPOLITAN MUSEUM OF ART OF THE CITY OF NEW YORK AND THE RHODE ISLAND HOSPITAL TRUST COMPANY, ADMINISTRATOR. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Tompkins McIlvaine, Lyman K. Clark* and *Wm. E. Carnochan* for petitioners. *Messrs. Robert Thorne, Wm. R. Tillinghast* and *James C. Collins* for respondents.

No. 568. AUTOMOTIVE PRODUCTS CORPORATION *v.* WOLVERINE BUMPER & SPECIALTY COMPANY ET AL. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George L. Wilkinson* for petitioner. *Mr. Frederick S. Duncan* for respondents.

No. 570. JACOB MARCUS ET AL. *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lourie C. Barton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 571. SPENCER KELLOGG & SONS, INC., *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank Gibbons* for petitioner. *Solicitor General Mitchell* and *Assistant to the Attorney General Donovan* for the United States.

No. 583. DAISY L. BURNESON *v.* UNITED STATES. November 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frank F. Gentsch* and *Joseph W. Heintzman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 563. OTIS ELEVATOR COMPANY *v.* LOIS HOSKINS AND HOTEL RANDOLPH COMPANY. November 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. The Chief Justice took no part in the consideration or decision of the petition for a writ of certiorari in this case. *Messrs. Edwin W. Sims, Elwood G. Godman* and *James L. Coleman* for petitioner. *Messrs. Joseph G. Gamble, Donald Evans, Clifford B. Cox* and *Wm. F. Riley* for respondent.

No. 490. MOLLIE TIGER AND BABY CUMSEY, BY C. L. GARBER ET AL. *v.* F. S. LOZIER ET AL. See *ante*, p. 496.

No. 497. WARREN E. BROWN ET AL. *v.* LOUIS H. KRIETMEYER. See *ante*, p. 496.

No. 558. KUNGLIG JARNVAGSSTYRELSEN, ALSO KNOWN AS THE ROYAL ADMINISTRATION OF THE SWEDISH STATE RAILWAYS, *v.* NATIONAL CITY BANK OF NEW YORK AND DEXTER & CARPENTER, INC.; and

No. 559. SAME *v.* DEXTER & CARPENTER. See *ante*, p. 497.

No. 572. GYPSY OIL COMPANY *v.* LEO BENNETT ESCOE, A MINOR, BY O. W. STEPHENS, GUARDIAN. See *ante*, p. 498.

No. 576. W. E. THOMAS, TRUSTEE, *v.* J. M. LESTER. November 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Messrs. H. Rozier Dulany, Jr., A. L. Adams* and *H. L. Ponder* for petitioner. *Messrs. J. Merrick Moore* and *Clifton W. Gray* for respondent.

No. 580. LEO J. GONCH *v.* REPUBLIC STORAGE COMPANY, INC. November 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. John P. Loughran* for petitioner. *Mr. Outerbridge Horsey* for respondent.

No. 581. AMERICAN COLONIAL BANK OF PORTO RICO *v.* MERCEDES GUERRA Y COBIAN ET AL.; and

No. 582. SAME *v.* SAME. November 28, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis E. Neagle* for petitioner. *Mr. Hugh R. Francis* for respondents.

No. 584. L. F. VANCE *v.* CHICAGO PORTRAIT COMPANY ET AL. November 28, 1927. Petition for a writ of certiorari to the District Court of the United States for the Northern District of Illinois denied. *Mr. L. F. Vance, pro se. Mr. John T. Evans* for respondents.

No. 585. L. F. VANCE *v.* CHICAGO PORTRAIT COMPANY. November 28, 1927. Petition for a writ of certiorari to

the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. L. F. Vance, pro se.* *Mr. John T. Evans* for respondent.

No. 587. JOHN A. VESEY *v.* V. K. IRION, COMMISSIONER OF CONSERVATION, ET AL. November 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Messrs. R. C. Milling* and *Eugene B. Saunders* for petitioner. No appearance for respondents.

No. 590. COLUMBUS ELECTRIC & POWER COMPANY AND S. MORGAN SMITH COMPANY *v.* ALLIS-CHALMERS MANUFACTURING COMPANY AND WILLIAM M. WHITE. Novem- 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert C. Alston* and *Hubert Howson* for petitioners. *Messrs. Clifton V. Edwards, George F. De Wein* and *J. Blanc Monroe* for respondents.

No. 591. PERCIVAL WILDS, TRUSTEE, *v.* LEBANON NATIONAL BANK. November 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Caruthers Ewing* and *Bertram F. Shipman* for petitioner. *Mr. John E. Joyce* for respondent.

No. 593. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE *v.* MARIE KRUGER. November 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Ellwood P. Morey* for petitioner. *Mr. Edwin J. Baumberger* for respondent.

No. 594. THE VILLAGE OF UNIVERSITY HEIGHTS AND JOHN MIGCHELBRINK, INSPECTOR OF BUILDINGS, *v.* THE CLEVELAND JEWISH ORPHAN HOME. November 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick A. Henry* for petitioners. *Messrs. Newton D. Baker* and *Robert M. Morgan* for respondent.

No. 595. W. FREELAND DALZELL *v.* STEAMSHIP "HERMES," BRUUSGAARD KIOSTERUDS DAMPSKIBS AKTIESELSKABET. November 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Mr. John W. Griffin* for respondent.

No. 598. HUSSEY TIE COMPANY *v.* KNICKERBOCKER INSURANCE COMPANY. November 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel W. Fordyce, John H. Holliday, Thomas W. White* and *Walter R. Mayne* for petitioner. *Messrs. Wendell P. Barker, Thomas S. McPheeters* and *Henry Davis* for respondent.

No. 588. EDWIN C. JAMESON ET AL. *v.* GUARANTY TRUST COMPANY OF NEW YORK AND MERREL P. CALLAWAY, TRUSTEES, ROBERT T. SWAINE ET AL. November 28, 1927. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Mr. Justice Brandeis took no part in the consideration or decision of the petition for certiorari in this case. *Messrs. John Lewis Smith, Robert K. Prentice* and *Irvine L. Lenroot* for petitioners. *Messrs. Silas H. Strawn, Ralph M. Shaw, H. H. Field, Paul D. Cravath, Robert T. Swaine, John W. Davis, Edwin S. Sunderland,* and *Wm. A. Stewart* for respondents.

No. 125. GEORGE WELCH AND JACKOLINE WELCH *v.* WADDELL INVESTMENT COMPANY. See *ante*, p. 505.

No. 605. MARYLAND CASUALTY COMPANY *v.* OHIO RIVER GRAVEL COMPANY. December 5, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wilton J. Lambert, D. H. Arnold, George F. Cushwa* and *R. H. Yeatman* for petitioner. No appearance for respondent.

No. 606. MARYLAND CASUALTY COMPANY *v.* OHIO RIVER GRAVEL COMPANY AND ZEBEDEE WESTFALL. December 5, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wilton J. Lambert, D. H. Arnold, George F. Cushwa* and *R. H. Yeatman* for petitioner. *Messrs. U. G. Young* and *J. C. McWhorter* for respondents.

No. 608. BENZO GAS MOTOR FUEL COMPANY *v.* THE NATIONAL REFINING COMPANY. December 5, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry L. McCune* for petitioner. *Messrs. T. H. Hogsett* and *I. J. Ringolsky* for respondent.

No. 609. LOUISIANA RAILWAY & NAVIGATION COMPANY *v.* WALTER MCGLORY. December 5, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. H. Randolph* for petitioner. *Mr. S. P. Jones* for respondent.

No. 127. BACON SERVICE CORPORATION *v.* FRED C. HUSS, CAPTAIN OF THE FRESNO COUNTY TRAFFIC SQUAD. See *ante*, p. 507.

No. 601. ISAAC G. JOHNSON & COMPANY *v.* PEOPLE OF THE STATE OF NEW YORK. December 12, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. John J. McKelvey, Morgan J. O'Brien* and *Martin Conboy* for petitioner. *Mr. Albert Ottinger,* Attorney General of New York, for respondent.

No. 602. ANTONIO FANTAUZZI *v.* JOSÉ ESTEBAN GARCIA. December 12, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis E. Neagle* for petitioner. *Mr. E. B. Wilcox* for respondent.

No. 604. FANNIE D. LAKE ET AL. *v.* CENTRAL SAVINGS BANK OF OAKLAND. December 12, 1927. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Charles Reagh* for petitioners. *Messrs. R. M. Fitzgerald* and *Charles A. Beardsley* for respondent.

No. 613. LEHIGH VALLEY RAILROAD COMPANY *v.* THE STATE OF RUSSIA; and

No. 614. SAME *v.* SAME. December 12, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles A. Boston, George S. Hobart* and *Frederic D. McKenney* for petitioner. *Messrs. Frederic R. Coudert, Hartwell Cabell, Mahlon B. Doing* and *Blaine S. Sturgis* for respondent.

No. 617. JOSEPH Y. ZOTTARELLI AND NICOLA SALUPO *v.* UNITED STATES. December 12, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr Joseph C. Breitenstein* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 618. C. A. WENSTRAND *v.* UNITED STATES; and

No. 619. D. A. WENSTRAND *v.* UNITED STATES. December 12, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thos. S. Allen* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 621. BONDED PRODUCTS CORPORATION *v.* THE ANDREW JERGENS COMPANY. January 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. P. Bachman* for petitioner. *Messrs. Walter A. DeCamp* and *Edward S. Rogers* for respondent.

No. 622. WILLIAM P. DEPPE AND DEPPE MOTORS CORPORATION *v.* GENERAL MOTORS CORPORATION. January 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Livingston Gifford* for petitioners. *Messrs. Melville Church, Frederick P. Fish* and *J. L. Stackpole* for respondent.

No. 625. NORTHERN PACIFIC RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION. January 3, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Charles W. Bunn, Dennis F. Lyons, Frederic D. McKenney* and *J. Spalding Flannery* for petitioner. *Mr. P. J. Farrell* for respondent.

No. 361. W. T. IRWIN ET AL. *v.* THE MISSOURI VALLEY BRIDGE & IRON CO. January 3, 1928. The motion for leave to file petition for a rehearing herein, made after the expiration of the twenty-five days within which, under rule 30, the petition ought to have been filed, is granted.

But the Court, after consideration of the full brief filed with the motion and the other briefs considered on the original hearing of the petition for certiorari, again denies the petition. *Messrs. Kemper K. Knapp, John R. Cochran, Frank E. Tyler* and *Joseph A. O'Donnell* for petitioners. *Messrs. Chester I. Long, Lee Bond* and *Fred B. Silsbee* for respondent. See p. 540.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 3, 1927, TO AND INCLUDING JANUARY 3, 1928.

No. 15. THOMAS M. ADAMS *v.* UNITED STATES. Appeal from the Court of Claims. October 3, 1927. Dismissed per stipulation of counsel, on motion of *Solicitor General Mitchell, Attorney General Galloway,* and *Mr. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, for the United States. *Messrs. Simeon S. Willis* and *H. R. Dysart* for appellant.

No. 574. CURTIS FRIEDLANDER *v.* STATE OF WASHINGTON. Error to the Supreme Court of the State of Washington. October 3, 1927. Docketed and dismissed with costs on motion of *Mr. Blaine Mallan* for the defendant in error. No appearance for plaintiff in error.

No. 200. THE LAKEWOOD ENGINEERING COMPANY AND EDWARD G. CARR *v.* A. W. FRENCH & Co., ALFRED W. FRENCH, ET AL. On writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. October 3, 1927. Dismissed with costs per stipulation of counsel, and mandate granted, on motion of *Mr. Frank Dennett* in that behalf, for petitioner. *Messrs. Rudolph W. Lotz* and *Arthur W. Nelson* for respondents.

No. 51. ANDREW P. VOUGHT *v.* K. K. KANNE, TRUSTEE. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. October 3, 1927. Dismissed with costs on motion of *Mr. Charles Bunn* for petitioner. *Mr. Charles B. Elliott* for respondent.

No. 132. THE WICHITA BOARD OF TRADE *v.* THE FARMER'S CO-OPERATIVE COMMISSION COMPANY AND A. E. RANDALL. Error to the Supreme Court of the State of Kansas. October 3, 1927. Dismissed with costs on motion of *Mr. Ray Campbell,* for plaintiff in error. *Messrs. Fred S. Jackson* and *John W. Davis* for defendants in error.

No. 273. SEABOARD AIR LINE RAILWAY COMPANY *v.* STATE OF FLORIDA, EX REL. A. S. WELLS ET AL. On petition for a writ of certiorari to the Supreme Court of the State of Florida. October 3, 1927. Dismissed with costs per stipulation of counsel. *Mr. James F. Wright* for petitioner. No appearance for respondents.

No. 467. NICOLA SACCO AND BARTHOLOMEO VANZETTI *v.* COMMONWEALTH OF MASSACHUSETTS. On petition for a writ of certiorari to the Superior Court of the State of Massachusetts. October 3, 1927. Dismissed on motion of *Messrs. Arthur D. Hill, Elias Field,* and *Michael A. Musmanno* for petitioners. No appearance for respondent.

No. 468. NICOLA SACCO AND BARTHOLOMEO VANZETTI *v.* COMMONWEALTH OF MASSACHUSETTS. On petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts. October 3, 1927. Dismissed on motion of *Messrs. Arthur D. Hill, Elias Field,* and *Michael A. Musmanno* for petitioners. No appearance for respondent.

No. 136. HUDSON COAL COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. October 3, 1927. Dismissed with costs, per stipulation of counsel. *Messrs. John H. Barnes, William S. Snyder* and *H. T. Newcomb* for plaintiff in error. *Messrs. George W. Woodruff* and *John R. Jones* for defendant in error.

No. 378. UNITED STATES, USE OF UNION GAS ENGINE COMPANY *v.* NEWPORT SHIPBUILDING CORPORATION, LIMITED, NATIONAL SURETY COMPANY. On petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. October 17, 1927. Dismissed on motion of *Messrs. Edmund L. Jones, Frank J. Hogan* and *Thomas M. Fields* for petitioner. *Messrs. Wm. H. White* and *Ellwood P. Morey* for respondents.

No. 381. WELDON J. BAILEY *v.* STATE OF ARIZONA, ON RELATION OF JOHN W. MURPHY, ATTORNEY GENERAL. On petition for a writ of certiorari to the Supreme Court of the State of Arizona. October 17, 1927. Dismissed for failure to comply with the rules. *Messrs. Weldon J. Bailey, pro se,* and *John W. Ray* for petitioner. No appearance for respondent.

No. 578. WILLIAM R. BERRY *v.* C. A. BATES ET AL. Error to the District Court of Appeal, First Appellate District, State of California. October 17, 1927. Dismissed on motion of *Mr. R. M. F. Soto* for plaintiff in error. No appearance for defendants in error.

No. 55. RAILROAD COMMISSION OF WISCONSIN, JOHN J. BLAINE, GOVERNOR, ET AL. *v.* CHICAGO AND NORTH WESTERN RAILWAY COMPANY ET AL. Appeal from the

District Court of the United States for the Eastern District of Wisconsin. October 20, 1927. Dismissed on motion of *Messrs. Herman S. Ekern, Eugene Wengert* and *Daniel W. Sullivan* for appellants. *Messrs. Wm. A. Hayes* and *Samuel Cady* for appellees.

No. 56. PRODUITS METALLURGIQUES ANCIENS ETABLISSEMENTS MEIBOOM & CIE, SOCIETE ANONYME, *v.* GULF EXPORT & TRANSPORTATION COMPANY. On writ of certiorari to the Supreme Court of the State of New York. October 20, 1927. Dismissed pursuant to Rule 19, on motion of *Mr. E. Curtis Rouse* for the respondent. *Mr. Henry G. Gray* for petitioner.

No. 383. E. DITTBURNER *v.* THE STATE OF TENNESSEE. Error to the Supreme Court of the State of Tennessee. October 27, 1927. Dismissed pursuant to Rule 19. *Messrs. Charles M. Bryan* and *Arthur G. Brode* for plaintiff in error. *Mr. L. D. Smith* for defendant in error.

No. 107. UNITED STATES *v.* UNITED CIGAR STORES COMPANY OF AMERICA. On writ of certiorari to the Court of Claims. October 31, 1927. Dismissed and mandate granted on motion of *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, for the United States. *Messrs. S. M. Stroock, C. C. Carlin,* and *M. Carter Hall* for respondent.

No. 437. JOHN HOWELL *v.* GEORGIA. Error to the Supreme Court of the State of Georgia. November 21, 1927. Dismissed with costs on motion of *Mr. W. A. McClellan* for plaintiff in error. No appearance for defendant in error.

No. 161. E. M. JONES BURGET *v.* THE BOROUGH OF DORMONT, PITTSBURGH, PENNSYLVANIA. Error to the Circuit Court of Appeals for the Third Circuit. November 28, 1927. Dismissed pursuant to Rule 11. *E. M. Jones Burget, pro se.* No appearance for the defendant in error.

No. 128. SEABOARD AIR LINE RAILWAY COMPANY, *v.* STATE OF FLORIDA, EX REL. R. HUDSON BURR, A. S. WELLS, ET AL. On writ of certiorari to the Supreme Court of the State of Florida. December 1, 1927. Dismissed on motion of *Messrs. T. W. Davis, James F. Wright, W. E. Kay, Thos. B. Adams* and *Frank W. Gwathmey* for petitioner. *Messrs. Fred. H. Davis* and *George C. Bedell* for respondents.

No. 129. ATLANTIC COAST LINE RAILROAD COMPANY *v.* STATE OF FLORIDA, EX REL. R. HUDSON BURR, A. S. WELLS, ET AL. On writ of certiorari to the Supreme Court of the State of Florida. December 1, 1928. Dismissed on motion of *Messrs. T. W. Davis, James F. Wright, W. E. Kay, Thos. B. Adams* and *Frank W. Gwathmey* for petitioner. *Messrs. Fred H. Davis* and *G. C. Bedell* for respondents.

No. 192. GEORGE MCNEIR *v.* CHARLES W. ANDERSON, COLLECTOR. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. January 3, 1928. Reversed on confession of error, and mandate granted, on motion of *Solicitor General Mitchell* in that behalf. *Mr. Russell L. Bradford* for petitioner.

No. 505. CHICAGO CHEESE AND FARM PRODUCTS CO. *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. January 3, 1928. Dismissed on mo-

tion of *Mr. Robert N. Golding,* in behalf of *Mr. Willis D. Nance* and *Mr. Joseph B. Fleming,* for the petitioner. No appearance for the United States.

CASES DISPOSED OF DURING VACATION.

No. 123. UNITED STATES *v.* DAVID R. J. ARNOLD, ADMR. July 5, 1927. Dismissed pursuant to the 32d rule. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Fred K. Dyar* for the United States. *Mr. T. Ludlow Chrystie* for respondent.

No. 118. FRANK K. BOWERS, COLLECTOR, *v.* WALTER E. FREW ET AL., EXECUTORS. July 13, 1927. Dismissed pursuant to the 32d rule. *Solicitor General Mitchell* for petitioner. *Messrs. Abram J. Rose, Alfred C. Petté* and *Philip M. Brett* for respondents.

No. 453. HENRY E. HOLMES ET AL *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. August 17, 1927. Docketed and dismissed under Rule 10 by *Messrs. Carl I. Wheat* and *Walker H. Robinson* for defendants in error. *Mr. Max Thelen* for plaintiffs in error.

No. 322. BRANDES PRODUCTS CORPORATION *v.* LEKTOPHONE CORPORATION. September 4, 1927. Dismissed pursuant to the 32d Rule. *Messrs. Livingston Gifford, George F. Scull* and *John Boyle, Jr.,* for petitioner. No appearance for respondent.

APPENDIX

REVISED RULES

OF

THE SUPREME COURT

OF

THE UNITED STATES

ADOPTED JUNE 5, 1928. EFFECTIVE JULY 1, 1928

(The Acts of February 13, 1925, c. 229, 43 Stat. 936; January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466, are printed as an appendix to the Rules.)

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Revised Rules of the Supreme Court of the United States.

Adopted June 5, 1928. Effective July 1, 1928.

(The Acts of February 13, 1925, c. 229, 43 Stat. 936, January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466, are printed in an Appendix.)

FOR REVIEW ON APPEAL SEE RULES 9, 10, 12, 36 and 46, AMONG OTHERS.

FOR REVIEW ON CERTIORARI SEE, AMONG OTHERS, RULES 38, 39, 41 AND 42.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

2. The clerk shall not permit any original record or paper to be taken from the office without an order from the court or one of the justices, except as provided by Rule 13, paragraph 4.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the State, Territory, District, or Insular Possession to which they respectively belong, and that their private and professional characters shall appear to be good.

2. In advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, and (2) his personal statement setting out the date and place of his birth, the names of his parents, his place of residence and office address, the courts of last resort to which he has been admitted, the places where he has been a practitioner, and, if he is not a native born citizen, the date and place of his naturalization.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he knows, or after reasonable inquiry believes, the applicant possesses the necessary qualifications and has filed with the clerk the required certificate and statement.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

I, ——— ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

5. Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred.

3.

CLERKS TO JUSTICES NOT TO PRACTICE.

No one serving as a law clerk or secretary to a member of this court shall practice as an attorney or counsellor in

any court while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years shall have elapsed after such separation.

4.

LAW LIBRARY.

1. During the sessions of the court, any gentleman of the bar having a case on the docket, and wishing to use any books in the law library, shall be at liberty, upon application to the clerk, to receive an order to take the same (not exceeding four at any one time) from the library, he becoming thereby responsible for the prompt return of the same. And if the same be not so returned, he shall be responsible for, forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond two days.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions and briefs therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

5.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of Congress.

6.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney general, of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of such process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

7.

MOTIONS—INCLUDING THOSE TO DISMISS OR AFFIRM—SUMMARY DOCKET—MOTION DAY.

1. Every motion to the court shall be printed, and shall state clearly its object and the facts on which it is based.

2. Oral argument will not be heard on any motion unless the court specially assigns it therefor, when not exceeding one-half hour on each side will be allowed.

3. All motions to dismiss appeals or writs of certiorari, except motions to docket and dismiss under Rule 11, must be submitted in the first instance on printed briefs. If the court desires further argument, it will be ordered.

The party moving to dismiss shall serve notice of the motion, with a copy of his brief, on counsel of record for the other party, and due proof of service shall be filed with the clerk when the motion is filed.

The other party shall have 20 days within which to file a printed brief opposing the motion, except that where his counsel resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado,

Wyoming, Montana, or an outlying possession, the time shall be 25 days.

On the first motion day following the expiration of the time for filing the opposing brief, or following an express waiver of the right to file or the actual filing of such brief in a shorter time, the motion and the briefs thereon shall be submitted by the clerk to the court for its consideration.

These provisions respecting motions to dismiss are not intended to be restrictive of or to weaken those in Rule 12.

4. The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The procedure provided in paragraph 3 of this rule for motions to dismiss shall apply to and control motions to affirm. A motion to affirm may be united in the alternative with a motion to dismiss.

5. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to the summary docket. The hearing of causes on such docket will be expedited from time to time as the regular order of business may permit. A cause may be transferred to the summary docket on application, or on the court's own motion. See Rule 28, paragraphs 3 and 6.

6. Monday of each week, when the court is in session, shall be motion day; and motions specially assigned for oral argument shall be entitled to preference over other cases.

8.

BILLS OF EXCEPTION—CHARGE TO JURY—OMISSION OF UNNECESSARY EVIDENCE.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23.

9.

ASSIGNMENT OF ERRORS.

Where an appeal is taken to this court from a state court, a district court or a circuit court of appeals (see sections 237(a), 238 and 240(b) of the Judicial Code as amended February 13, 1925), the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors (see Rev. Stat. sec. 997), which shall set out separately and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition. See Rule 36.

10.

APPEAL—CITATION—RECORD—DESIGNATION OF PARTS TO BE INCLUDED IN TRANSCRIPT.

1. When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding thirty days from the day of signing the citation, whether the return

day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming and Montana, when the time shall be sixty days. The citation must be served before the return day.

2. The clerk of the court from which an appeal to this court may be allowed, shall make and transmit to this court under his hand and the seal of the court a true copy of the material parts of the record, always including the assignment of errors, and any opinions delivered in the case.

To enable the clerk to perform such duty and for the purpose of reducing the size of transcripts and eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant, or his counsel, to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee, or his counsel, a *praecipe* indicating the portions of the record to be incorporated into the transcript. Should the appellee, or his counsel, desire additional portions of the record incorporated into the transcript, he or his counsel shall file with the clerk of the lower court his *praecipe,* within ten days thereafter (unless the time be enlarged by a judge of the lower court or a justice of this court), indicating the additional portions of the record desired to be included. See Equity Rules 75–77, 226 U. S. Appendix p. 23.

The clerk of the lower court shall transmit to this court as the transcript of the record only the portions of the record covered by such designations.

The parties or their counsel may by written stipulation filed with the clerk of the lower court indicate the portions of the record to be included in the transcript, and the clerk shall then transmit only the parts designated in such stipulation.

If this court shall find that any portion of the record unnecessary to a proper presentation of the case has been incorporated into the transcript at the instance of either

party, the whole or any part of the cost of printing and the clerk's fee for supervising the printing may be ordered to be paid by the offending party.

3. No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken, that original papers of any kind should be inspected in this court, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers along with the usual transcript.

5. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, findings of fact and conclusions of law thereon, opinions of the court, final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper determination of such questions.

11.

DOCKETING CASES.

1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dis-

missed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court.

2. But the appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument.

3. Upon the filing of the record brought up by appeal, the appearance of the counsel for the party docketing the case shall be entered.

12.

JURISDICTION TO REVIEW—APPELLANT REQUIRED ON DOCKETING CASE TO SHOW ON WHAT BASIS REVIEW ON APPEAL IS INVOKED—RELATED STEPS.

1. Within thirty days after docketing the case and filing the record, as provided in paragraph 1 of Rule 11, the appellant shall file with the clerk forty copies of a printed statement particularly disclosing the basis on which it is contended this court has jurisdiction to review on appeal the judgment or decree below. The statement shall (a) distinctly refer to the statutory provision believed to sustain the jurisdiction, (b) show, with definite references to the pertinent pages of the record, the date of the judgment or decree sought to be reviewed and the date on which the application for the appeal was presented, (c) show, with like references to the record, that the nature of the case and of the rulings below were such as to bring the case within the jurisdictional provision relied on, and (d) cite the cases believed to sustain the jurisdiction. The appel-

lant shall forthwith serve on the appellee a copy of this printed statement and shall file with the clerk due proof of such service.

2. The appellee shall have twenty days within which to file forty printed copies of a statement disclosing any matter or ground making against the jurisdiction asserted by the appellant, and shall serve a copy of such statement on the appellant and file due proof of the service with the clerk. If counsel for the appellee resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession the time for filing the opposing statement shall be twenty-five days instead of twenty.

3. On the second motion day following the expiration of the period for filing the opposing statement, or following an express waiver of the right to file or the actual filing of such statement in a shorter time, the statements required by the two preceding paragraphs shall be submitted by the clerk to the court for its consideration. Oral argument shall not be had thereon unless invited by the court. Nor shall oral argument be had on the question whether—regarding the appeal papers in an appeal from a state court of last resort as a petition for certiorari—a review on certiorari shall be granted under sec. 237 (c) of the Judicial Code as amended by the Act of February 13, 1925.

4. If the appellant fails to comply with paragraph 1 of this rule, the clerk shall report such failure to the court in order that it may take such action, by way of dismissal or otherwise, as it deems proper.

13.

PRINTING RECORDS—DESIGNATION OF POINTS INTENDED TO BE RELIED UPON AND OF PARTS OF RECORD TO BE PRINTED.

1. In all cases the appellant, on docketing a case and filing the record, shall make such cash deposit with the

clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor (see paragraph 9 of this rule), the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the printing, and other probable fees, and shall furnish the same to the party docketing the case. If such estimated sum be not paid within seventy days after the cause is docketed, it shall be the duty of the clerk to report that fact to the court, whereupon the cause will be dismissed, unless good cause to the contrary is shown.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 10, paragraph 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fees of the clerk, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fees shall exceed the estimate, the excess shall be paid to the clerk within forty days after notice thereof, and if it be not paid the matter shall be dealt with as if it were a default under paragraph 2 of this rule, as well as by rendering a judgment against the defaulting party for such excess.

7. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fees shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of a party or his surety, of having served on such party or surety a copy of the bill of fees due by him in this court, and showing that payment has not been made, an attachment shall issue against such party or surety to compel payment of such fees.

9. When the record is filed, or within fifteen days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within twenty days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the appellant. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The statement of points intended to be relied upon and the designations of the parts of the record to be printed shall be printed by the clerk with the record. He shall, however, omit all duplication, all repetition of titles and all other obviously unimportant matter, and make proper note thereof. The court will consider nothing but the points of law so stated and the parts of the record so designated. If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If either party shall have caused unnecessary

parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 32, paragraph 6, shall be computed on the folios in the record as filed, and shall be in full for the performance of his duties in that regard.

14.

TRANSLATIONS.

Whenever any record transmitted to this court upon appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and printed with the record.

15.

FURTHER PROOF.

1. In all cases where further proof is ordered by this court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, requiring him to file cross-interrogatories within twenty days from the service of such notice.

16.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent.

17.

CERTIORARI TO CORRECT DIMINUTION OF RECORD.

No *certiorari* to correct diminution of the record will be awarded in any case, unless a printed motion therefor shall be made, and the facts on which the same is founded shall be shown, if not admitted by the other party, by affidavit. All such motions must be made not later than the first motion day after the expiration of sixty days from the printing of the record, unless for special cause shown the court receives the motion at a later time.

18.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the marshal at least one month before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material, placed in the custody of the marshal must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the marshal to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after

such notice, the marshal shall destroy them, or make such other disposition of them as to him may seem best.

19.

DEATH OF PARTY—REVIVOR—SUBSTITUTION.

1. Whenever, pending an appeal or writ of certiorari in this court, either party shall die, the proper representative in the personalty or realty of the deceased, according to the nature of the case, may voluntarily come in and be admitted as a party to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such order, if appellee or respondent, shall be entitled to have the appeal or writ of certiorari dismissed; and if the party so moving be appellant or petitioner he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, District or Insular Possession, in which the case originated, for three successive weeks, at least sixty days before the expiration of the time designated for the representative of the deceased party to appear.

2. When the death of a party is suggested, and the representative of the deceased does not appear by the second day of the term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their [his] appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute an appeal or writ of certiorari to this court from any final judgment or decree, rendered in that court, and at the time of applying for such appeal or writ of certiorari the other party to the suit shall be dead and have no proper representative within

the jurisdiction of that court, so that the suit can not be revived in that court, but shall have a proper representative in some State, Territory or District of the United States, the party desiring such appeal or writ of certiorari may procure the same, if otherwise entitled thereto, and may have proceedings on such judgment or decree superseded or stayed in the manner allowed by law and shall thereupon proceed with such appeal or writ of certiorari as in other cases. And within thirty days after the time when such appeal or writ of certiorari is returnable, or if the court be not then in session within ten days after it next convenes, the appellant or petitioner shall make a suggestion to the court, supported by affidavit, that such party was dead when the appeal or writ of certiorari was allowed, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that such deceased party had a proper representative in some State, Territory or District of the United States—giving the name and character of such representative, and his place of residence; and, upon such suggestion and a motion therefor, an order may be obtained that, unless such representative shall make himself a party within a designated time the appellant or petitioner shall be entitled to open the record, and, on hearing have the judgment or decree reversed, if the same be erroneous: Provided, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the expiration of the time designated: And provided, also, That in every such case if the representative of the deceased party does not appear by the second day of the term next succeeding said suggestion, and the measures above provided to compel his appearance have not been taken as above required, by the opposite party, the case shall abate: And provided, also, That the representative may at any time before or

after the suggestion, but before such abatement, come in and be made a party and thereupon the case shall be heard and determined as in other cases.

4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office.

20.

CALL AND ORDER OF THE DOCKET—MOTIONS TO ADVANCE.

1. Unless it otherwise orders, the court, on the first day of each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed with the argument, the case shall be continued to the next term or otherwise dealt with as provided in these rules.

2. Ten cases only shall be subject to call on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons supporting the motion.

4. Criminal cases may be advanced by leave of the court on motion of either party.

5. Cases once adjudicated by this court upon the merits, and again brought up, may be advanced by leave of the court.

6. Revenue and other cases in which the United States is concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may be advanced by leave of the court on motion of the Attorney General.

7. Other cases may be advanced for special cause shown. When a case is advanced, under this or any other paragraph, it will be subject to hearing with any other case subsequently advanced and involving a like question, as if they were one case.

8. Two or more cases, involving the same question, may, by order of the court, be heard together, and argued as one case or on such terms as may be prescribed.

9. If, after a case has been continued under paragraph 1 of this rule, both parties desire to have it heard at the term of the continuance, they may file with the clerk their joint request to that effect accompanied by their affidavits or those of their counsel giving the reasons why they failed to present their argument when the case was called and why it should be reinstated. Such a request will be granted only when it appears to the court that there was good reason for the previous failure to proceed and that the request can be granted without prejudice to parties in other cases coming on regularly for hearing.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

11. Cases on the summary docket will be heard specially as provided in paragraph 5 of Rule 7.

21.

NO APPEARANCE OF APPELLANT OR PETITIONER.

Where no counsel appears and no brief has been filed for the appellant or petitioner when the case is called for hearing, the adverse party may have the appellant or petitioner called and the appeal or writ of certiorari dismissed, or may open the record and pray for an affirmance.

22.

NO APPEARANCE OF APPELLEE OR RESPONDENT.

Where the appellee or respondent fails to appear when the case is called for hearing, the court may hear argument on behalf of the party appearing and give judgment according to the right of the case.

23.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call, and there is no brief or appearance for either party, the case shall be dismissed at the cost of the appellant or petitioner.

24.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the appellant or petitioner, unless strong cause is shown for further postponement.

25.

SUBMISSION ON BRIEFS BY ONE OR BOTH PARTIES WITHOUT ORAL ARGUMENT.

1. Any case may be submitted on printed briefs regardless of its place on the docket, if the counsel on both sides choose to submit the same in that manner, before the first Monday in May of any term. After that date cases may be submitted on briefs alone only as they are reached on the regular call.

2. When a case is reached on the regular call, if a printed brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

3. When a case is reached on the regular call and argued orally in behalf of only one of the parties, no brief for the opposite party will be received after the oral argument begins, except as provided in the next paragraph of this rule.

4. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave granted in open court after notice to opposing counsel.

26.

FORM OF PRINTED RECORDS, PETITIONS, BRIEFS, ETC.

All records, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than small pica or 11-point type) adequately leaded; and the paper must be opaque and unglazed. The clerk shall refuse to receive any petition, motion or brief which has been printed otherwise than in substantial conformity to this rule.

27.

BRIEFS.

1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall be printed as prescribed in Rule 26 and shall contain in the order here indicated—

(a) A subject index of the matter in the brief, with page references, and a table of the cases (alphabetically

arranged), text books and statutes cited, with references to the pages where they are cited.

(b) A reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported.

(c) If paragraph 1 of Rule 12 has not been complied with, a concise statement of the grounds on which the jurisdiction of this court is invoked, embodying all that is required to be set forth in the statement described in that paragraph.

(d) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, e. g., (R. 12).

(e) A specification of such of the assigned errors as are intended to be urged.

(f) The argument (preferably preceded by a summary) exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon, and quoting the relevant parts of such statutes, federal and state, as are deemed to have an important bearing. If the statutes are long they should be set out in an appendix.

3. The counsel for an appellee or respondent shall file with the clerk forty printed copies of his brief, at least one week before the case is called for hearing—such brief to be of like character with that required of the other party, except that no specification of errors need be given, and that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified.

5. When, under this rule, an appellant or petitioner is in default, the court may dismiss the cause; and when an

appellee or respondent is in default, the court may decline to hear oral argument in his behalf.

6. No brief, required by this rule, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

28.

ORAL ARGUMENT.

1. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

3. Two counsel, and no more, will be heard for each party, save that in cases on the summary docket (see Rule 7, paragraph 5) only one counsel will be heard on the same side.

4. In cases on the regular docket (except where questions have been certified) one hour on each side, and no more, will be allowed for the argument, unless more time be granted before the argument begins. The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing.

5. In cases where questions have been certified to this court three-quarters of an hour shall be allowed to each side for oral argument.

6. In cases on the summary docket one-half hour on each side, and no more, will be allowed for the argument.

29.

OPINIONS OF THE COURT.

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause

the same to be printed and shall deliver a copy to the reporter.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

30.

INTEREST AND DAMAGES.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court.

4. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

31.

PROCEDENDO TO ISSUE ON DISMISSAL.

In all cases of the dismissal of any appeal or writ of certiorari in this court, the clerk shall issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, so that further proceedings may be had in

such court as to law and justice may appertain. See Rules 34 and 35.

32.

COSTS.

1. In all cases where any appeal or writ of certiorari shall be dismissed in this court, costs shall be allowed to the appellee or respondent unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when only the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree by this court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. No costs shall be allowed in this court either for or against the United States, except where specially authorized by statute and directed by the court.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.

For an admission to the bar and certificate under seal, including filing of preliminary certificate and statement, fifteen dollars.

For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, four cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

For a mandate or other process, five dollars.

For filing briefs, three dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

33.

REHEARING

A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after

judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

34.

MANDATES.

Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session. See Rules 31 and 35.

35.

DISMISSING CASES IN VACATION.

Whenever the appellant and appellee in an appeal, or the petitioner and respondent in a writ of certiorari, shall in vacation, by their attorneys of record, file with the clerk an agreement in writing that such appeal or writ shall be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter such dismissal and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue on such dismissal without an order of the court. See Rules 31 and 34.

36.

APPEALS—BY WHOM ALLOWED—SUPERSEDEAS.

1. In cases where an appeal may be had from a district court to this court the same may be allowed, in term time

or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court. In cases where an appeal may be had from a circuit court of appeals to this court the same may be allowed, in term time or in vacation by any judge of the circuit court of appeals or by a justice of this court. In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the requisite security therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal. See Rev. Stat., secs. 1000 and 1007, paragraph 1 of Rule 10, paragraph 2 of Rule 46, and Equity Rule 74, 226 U. S. Appendix p. 22. For stay pending application for review on writ of certiorari see Rule 38, paragraph 6.

2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

37.

QUESTIONS CERTIFIED BY A CIRCUIT COURT OF APPEALS OR THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(See Sec. 239 of the Judicial Code as amended by the Act of February 13, 1925.)

1. Where a circuit court of appeals or the Court of Appeals of the District of Columbia shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be so certified. Only questions or propositions of law may be certified and they must be distinct and definite.

2. If in such a cause it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up so that it may consider and decide the whole matter in controversy as upon appeal.

3. Where application is made for direction that the entire record be sent up, the application must be accompanied by a certified copy thereof.

38.

REVIEW ON WRIT OF CERTIORARI OF DECISIONS OF STATE COURTS, CIRCUIT COURTS OF APPEALS AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(See secs. 237(b) and 240(a) of the Judicial Code as amended by the Act of February 13, 1925.)

1. A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the Court of Appeals of the District of Columbia, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. For printing record see paragraph 7 of this rule.

2. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. See *United States* v. *Rimer*, 220 U. S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 392; *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508. Forty printed copies of the petition and supporting brief shall be filed. The petition will be deemed in time when it, the printed record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925.

3. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing, and due proof of service shall be filed with the Clerk. If the United States, or any of its officers, is respondent and has been represented in the court below by the Attorney General of the United States or any of his subordinates, the service of the petition, record and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have twenty days, and where he resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, shall have twenty-five days, after notice, within which to file forty printed copies of an opposing brief, conforming to Rules 26 and 27.

(a) Except during the summer recess, a brief in opposition filed on or before the Friday preceding the motion day on which the petition is to be submitted will be

received. If the date for filing a brief in opposition falls in the summer recess, the brief may be filed within forty days after the service of the notice, but this enlargement shall not extend the time to a later date than September 10th.

4. On the first motion day following the expiration of the period for filing the respondent's brief, or following an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, record and briefs shall be submitted by the clerk to the court for its consideration.

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(c) Where the Court of Appeals of the District of Columbia has decided a question of general importance,

or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court.

6. Section 8 (d) of the Act of February 13, 1925, prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending an application for review on writ of certiorari. The stay may be granted by a judge of the court rendering the judgment or decree, or by a justice of this court, and may be conditioned on the giving of security as in that section provided. See Rule 36.

7. The record must be printed conformably to Rule 26, with a suitable index, and thirty copies filed with the clerk. But where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court; but only to print such additions as may be necessary to show the proceedings in that court and the opinions there. When the petition is presented it will suffice to furnish ten copies of the record as printed below together with the proceedings and opinion in that court; but if the petition is granted the requisite additional printed copies must be promptly supplied, by further printing if necessary.

39.

CERTIORARI TO A CIRCUIT COURT OF APPEALS OR THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA BEFORE JUDGMENT.

(See sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925.)

Proceedings to bring up to this court on writ of certiorari a case pending in a circuit court of appeals or the Court of Appeals of the District of Columbia, before judg-

ment is given in such court, should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied. That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason.

40.

QUESTIONS CERTIFIED BY THE COURT OF CLAIMS.

(See sec. 3(a) of the Act of February 13, 1925.)

Where the Court of Claims shall certify to this court a question of law, concerning which instructions are desired for the proper disposition of a case, the certificate shall contain a statement of the case and of the facts on which such question arises. Questions of fact cannot be certified. The certification must be confined to definite and distinct questions of law.

41.

JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 3(b) of the Act of February 13, 1925.)

1. In any case in the Court of Claims where both parties request in writing, at the time the case is submitted, that the facts be specially found, it shall be the duty of that court to make and enter special findings of fact as part of its judgment.

2. In any case in that court where special findings of fact are not so requested at the time the case is submitted, a party aggrieved by the judgment may, not later than twenty days after its rendition, request the court in writing to find the facts specially; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a

part of its judgment. The judgment shall be regarded as remaining under the court's control for this purpose.

3. The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found.

4. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, judgment and opinion of the court, but not the evidence. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. The petition and record shall be filed with the clerk and 30 copies thereof shall be printed under his supervision in the same way and upon the same terms that records on appeal are required to be printed, save that the estimated cost of printing shall be paid within five days after the estimate is furnished by the clerk and if payment is not so made the petition may be summarily dismissed. When the petition and record are printed the petitioner shall forthwith serve a copy thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

5. Within twenty days after the petition and record are printed the petitioner shall file with the clerk forty copies of a printed brief in support of the petition—the brief to conform to the provisions of Rules 26 and 27; and the petitioner shall at the same time file with the clerk due proof that he has served a copy of the brief on the respondent or his counsel, together with a notice that the petition will be submitted to this court in accordance with this rule. The respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27, at any time during that twenty-day period. On the first motion day following the expiration of that period, or following an express waiver of the right to file

or the actual filing of such brief in a shorter time, the petition and record, with the briefs filed, shall be submitted by the clerk to the court for its consideration.

The provisions of subdivision (a) of paragraph 3 of Rule 38 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

6. The same general considerations will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims as are applied to applications for such writs to other courts. See paragraph 5 of Rule 38.

42.

JUDGMENTS OF COURT OF CUSTOMS APPEALS OR OF SUPREME COURT OF PHILIPPINE ISLANDS—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 195 Judicial Code, as amended or sec. 7 of the Act of February 13, 1925.)

Proceedings to bring up to this court on writ of certiorari a case from the Court of Customs Appeals or from the Supreme Court of the Philippines should conform, as near as may be, to the provisions of Rule 38. The same general considerations which control when such writs to other courts are sought will be applied to them.

43.

ORDER GRANTING CERTIORARI.

Whenever application for a writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith mail notice of the granting of the application to the court below and to counsel of record. The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

44.

RULES, COSTS, FEES, ETC., ON CERTIORARI.

Where not otherwise specially provided, the rules relating to appeals, including those relating to costs, fees and interest, shall apply, as far as may be, to petitions for, and causes heard on, certiorari.

45.

CUSTODY OF PRISONERS PENDING A REVIEW OF PROCEEDINGS IN HABEAS CORPUS.

(See Rev. Stat. sec. 765 and Act of Feb. 13, 1925, sec. 6.)

1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

46.

REVIEW ON APPEAL.

1. Appeals to this Court from decrees in suits in equity in the district courts and in the circuit courts of appeals are not affected by the act of January 31, 1928, or the amendatory act of April 26, 1928, both of which are copied in the appendix hereto. Such appeals, where admissible, must be sought, allowed and perfected as provided in other statutes and in the equity rules. See 226 U. S. appendix. The act of February 13, 1925, copied in the appendix hereto, shows when an appeal is admissible and when the mode of review is limited to certiorari.

2. Under the act of January 31, 1928, as amended by the act of April 26, 1928, the review which theretofore could be had in this court on writ of error may now be obtained on an appeal. But the appeal thereby substituted for a writ of error must be sought, allowed and perfected in conformity with the statutes theretofore providing for a writ of error. The appeal can be allowed only on the presentation of a petition showing that the case is one in which, under the legislation in force when the act of January 31, 1928, was passed, a review could be had in this court on writ of error. The petition must be accompanied by an assignment of errors (see Rule 9), and the judge or justice allowing the appeal must take proper security for costs and sign the requisite citation to the appellee. See paragraph 1 of Rule 10 and paragraph 1 of Rule 36. The citation must be served on the appellee or his counsel and filed, with proof of service, with the clerk of the court in which the judgment to be reviewed was entered. The mode of obtaining a supersedeas is pointed out in paragraph 2 of Rule 36.

47.

NO SESSION ON SATURDAY.

The court will not hear arguments or hold open sessions on Saturday.

48.

ADJOURNMENT OF TERM.

The court will at every term announce, at least three weeks in advance, the day on which it will adjourn, and will not take up any case for argument, or receive any case upon briefs or upon petition for certiorari, within two weeks before the adjournment, unless otherwise ordered for special cause shown.

49.

ABROGATION OF PRIOR RULES.

These rules shall become effective July 1, 1928, and be printed as an appendix to 275 U. S. The rules promulgated June 8, 1925, appearing in 266 U. S., Appendix, and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before these rules become effective.

APPENDIX TO RULES

ACT OF FEBRUARY 13, 1925.

Chapter 229, 43 Stat. 936.

Effective May 13, 1925.

An Act To amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

SEC. 128. (a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238.

"Second. In the United States district courts for Hawaii and for Porto Rico in all cases.

"Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus

proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in the Act approved September 21, 1922, amending prior laws relating to the Canal Zone.

"Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings.

"Fifth. In the United States Court for China, in all cases.

"(b) The circuit court of appeals shall also have appellate jurisdiction—

[1] First. To review the interlocutory orders or decrees of the district courts, including the District Courts of Alaska, Hawaii, Virgin Islands and Canal Zone, which are specified in section 129.

[2] Second. To review decisions of the district courts, under section 9 of the Railway Labor Act.

"(c) The circuit courts of appeal shall also have an appellate and supervisory jurisdiction under sections 24 and 25 of the Bankruptcy Act of July 1, 1898, over all proceedings, controversies, and cases had or brought in the district courts under that Act or any of its amendments, and shall exercise the same in the manner prescribed in those sections; and the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit in this regard shall cover the courts of bankruptcy in Alaska and Hawaii, and that of the Circuit Court of Appeals for the First Circuit shall cover the court of bankruptcy in Porto Rico.

"(d) The review under this section shall be in the following circuit courts of appeal: The decisions of a district

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[1] As amended by Act of April 11, 1928, Chapter 354, 45 Stat. 422.

[2] As amended by sec. 13(a), Act of May 20, 1926, Chapter 347, 44 Stat. 587.

court of the United States within a State in the circuit court of appeals for the circuit embracing such State; those of the District Court of Alaska or any division thereof, the United States district court, and the Supreme Court of Hawaii, and the United States Court for China, in the Circuit Court of Appeals for the Ninth Circuit; those of the United States district court and the Supreme Court of Porto Rico in the Circuit Court of Appeals for the First Circuit; those of the District Court of the Virgin Islands in the Circuit Court of Appeals for the Third Circuit; and those of the District Court of the Canal Zone in the Circuit Court of Appeals for the Fifth Circuit.

"(e) The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914.

"SEC. 129. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 239 and 240 shall apply to such cases in the circuit courts of appeals as to other cases therein: *Provided,* That the appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order

or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof: *Provided, however,* That the district court may, in its discretion, require an additional bond as a condition of the appeal."

[3](a) In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may also be taken to said court from an interlocutory decree in admiralty determining the rights and liabilities of the parties: *Provided,* That the same is taken within fifteen days after the entry of the decree: *And provided further,* That within twenty days after such entry the appellant shall give notice of the appeal to the appellee or appellees; but the taking of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just.

[4](b) That when in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals: *Provided,* That such appeal be taken within thirty days from the entry of such decree or from the date of this act; and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal.

SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of

[3]Act of April 3, 1926, Chapter 102, 44 Stat. 233.

[4]Act of February 28, 1927, Chapter 228, 44 Stat. 1261.

the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers

whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided,* That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 1010 of the Revised Statutes."

"SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

"(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

"(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States.

"(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final

judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

"(5) Section 316 of 'An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes' approved August 15, 1921."

"SEC. 239. In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

"(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that

event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

[5] SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; and under section 11 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.

SEC. 3. (a) That in any case in the Court of Claims, including those begun under section 180 of the Judicial Code, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause.

(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal.

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[5] As amended by sec. 13(b) of Act of May 20, 1926, Chapter 347, 44 Stat. 587.

(c) All judgments and decrees of the Court of Claims shall be subject to review by the Supreme Court as provided in this section, and not otherwise.

SEC. 4. That in cases in the district courts wherein they exercise concurrent jurisdiction with the Court of Claims or adjudicate claims against the United States the judgments shall be subject to review in the circuit courts of appeals like other judgments of the district courts; and sections 239 and 240 of the Judicial Code shall apply to such cases in the circuit courts of appeals as to other cases therein.

SEC. 5. That the Court of Appeals of the District of Columbia shall have the same appellate and supervisory jurisdiction over proceedings, controversies, and cases in bankruptcy in the District of Columbia that a circuit court of appeals has over such proceedings, controversies, and cases within its circuit, and shall exercise that jurisdiction in the same manner as a circuit court of appeals is required to exercise it.

SEC. 6. (a) In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) In such a proceeding in the Supreme Court of the District of Columbia, or before a justice thereof, the final order shall be subject to review, on appeal, by the Court of Appeals of that District.

(c) Sections 239 and 240 of the Judicial Code shall apply to habeas corpus cases in the circuit courts of appeals and in the Court of Appeals of the District of Columbia as to other cases therein.

(d) The provisions of sections 765 and 766 of the Revised Statutes, and the provisions of an Act entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," approved March 10, 1908, shall apply to appellate proceedings under this section as they heretofore have applied to direct appeals to the Supreme Court.

SEC. 7. That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, or wherein the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question, it shall be competent for the Supreme Court of the United States, upon the petition of a party aggrieved by the final judgment or decree, to require, by certiorari, that the cause be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought before it on writ of error or appeal; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review.

SEC. 8. (a) That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months: *Provided,* That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

(b) Where an application for a writ of certiorari is made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judgment

or decree the application may be made at any time prior to the hearing and submission in that court.

(c) No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

(d) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

SEC. 9. That in any case where the power to review, whether in the circuit courts of appeals or in the Supreme Court, depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the cause or by other competent evidence.

SEC. 10. That no court having power to review a judgment or decree of another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out; but where such error occurs the same shall be disregarded and the court shall proceed as if in that regard its power to review were properly invoked.

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

SEC. 12. That no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: *Provided,* That this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock.

SEC. 13. That the following statutes and parts of statutes be, and they are, repealed:

Sections 130, 131, 133, 134, 181, 182, 236, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, and 252 of the Judicial Code.

Sections 2, 4, and 5 of "An Act to amend an Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary,' approved March 3, 1911," approved January 28, 1915.

Sections 2, 3, 4, 5, and 6 of "An Act to amend the Judicial Code, to fix the time when the annual term of the Supreme Court shall commence, and further to define the jurisdiction of that court," approved September 6, 1916.

Section 27 of "An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands," approved August 29, 1916.

So much of sections 4, 9, and 10 of "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, as provides for a review by the Supreme Court on writ of error or appeal in the cases therein named.

So much of "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," approved March 10, 1908, as permits a direct appeal to the Supreme Court.

So much of sections 24 and 25 of the Bankruptcy Act of July 1, 1898, as regulates the mode of review by the Supreme Court in the proceedings, controversies, and cases therein named.

So much of "An Act to provide a civil government for Porto Rico, and for other purposes," approved March 2, 1917, as permits a direct review by the Supreme Court of cases in the courts in Porto Rico.

So much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii.

So much of section 9 of the Act of August 24, 1912, relating to the government of the Canal Zone as designates

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An Act entitled "An Act to amend section 237 of the Judicial Code," approved February 17, 1922.

An Act entitled "An Act to amend the Judicial Code in reference to appeals and writs of error," approved September 14, 1922.

All other Acts and parts of Acts in so far as they are embraced within and superseded by this Act or are inconsistent therewith.

SEC. 14. That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect.

Approved, February 13, 1925.

ACT OF JANUARY 31, 1928.

Chapter 14, 45 Stat. 54.

An Act In reference to writs of error.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

SEC. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office

of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts.

ACT OF APRIL 26, 1928.

Chapter 440, 45 Stat. 466

An Act To amend section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"SEC. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

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